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Sup Ct

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [REDACTED] 1957

No. [REDACTED]

2



OLETA O'CONNOR YATES, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 20, 1955

CERTIORARI GRANTED JANUARY 18, 1956

No. 13541

**United States
Court of Appeals**
for the Ninth Circuit.

OLETA O'CONNOR YATES,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeal from the United States District Court,
Southern District of California,
Central Division.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

BEN MARGOLIS,
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For Appellee:

WALTER S. BINNS,
United States Attorney;
RAY H. KINNISON,
NORMAN W. NEUKOM,
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Los Angeles 12, Calif.

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In the United States District Court in and for the
Southern District of California, Central Division

No. 22379—Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OLETA O'CONNOR YATES,

Defendant.

**ORDER, JUDGMENT AND CERTIFICATE
OF CRIMINAL CONTEMPT**

In conformity with Rule 42 (a), Federal Rules of Criminal Procedure, 18 U.S.C.A., I hereby certify that on June 30, 1952, the series of criminal contempts set forth below, consisting of the refusal of the defendant Oleta O'Connor Yates to answer proper and relevant questions put to her on cross-examination, were committed in the actual presence of the Court and were seen or heard by the Court during the trial of the case of United States v. Schneiderman, et al., No. 22131-CD:

Specification I.

Q. Were you ever at the home of Bessie Honig at a state board meeting or any other meeting of the Communist Party when one Leo Kaplan, often referred to as Kappy, was present?

A. Well, I must repeat the answer that I gave a few minutes ago with respect to that question.

The Court: Answer the question, Mrs. Yates.

The Witness: I must decline to do so for the reasons given.

The Court: You refuse to answer the question?

The Witness: Yes, I do. [2*]

The Court: I must hold you again in contempt of court.

Specification II.

Q. (By Mr. Neukom): Is it not true that in the year 1948 one Leon Kaplan, also known as Kappy, was, to your knowledge, and understanding, a member of the Communist Party of the United States?

A. Well, that is the same—

Mr. Margolis: Just a moment. I object to that on the ground it is incompetent, irrelevant and immaterial.

The Court: Overruled. Answer the question.

The Witness: That is the same question as the one just asked in essence, and the answer to it must necessarily be the same.

The Court: By that do you mean you refuse to answer?

The Witness: Yes, I do, your Honor.

The Court: Then I hold you again in contempt of court.

Specification III.

Q. (By Mr. Neukom): How many years have you known one Leon Kaplan?

A. Oh, I met him perhaps seven years ago.

Q. Have you been to many meetings of the Communist Party where he has been present?

*Page numbering appearing at foot of page of original Certified Transcript of Record.

A. This is again the same question, and if you ask it in 20 different forms, if the content is the same, my answer must be the same.

The Court: I instruct you to answer the question, Mrs. Yates. Do you decline to answer the question?

The Witness: I do, your Honor.

The Court: Then I must hold you in contempt of court.

Specification IV.

Q. (By Mr. Neukom): Did you know one Ida Rothstein? A. Yes, I knew Mrs. Rothstein.

Q. For about how many years have you known her? [3]

A. Oh, a great many years—perhaps 15 or 16.

Q. Have you known her in conjunction with your work with the Communist Party of the United States? A. I don't understand that question.

Q. I will reframe it. Did you meet Ida Rothstein in connection with your duties as a member of the Communist Party of the State of California or of the United States?

A. Well, I don't recall when I did meet her, to tell the truth.

Q. Is it not true that Ida Rothstein has for the last five or six years at least been a club chairman or the leader of one or more of the clubs of the Communist Party situated in the City of San Francisco?

A. That is asking me to say that Ida Rothstein is a Communist.

Q. I will ask you that question. Is Ida Rothstein a Communist?

The Witness: I decline to answer it.

Mr. Neukom: Does your Honor—

The Court: You understand that question to be: Is she known to you as a member of the Communist Party?

The Witness: Yes, I do, your Honor.

The Court: Is that the way you understand the question?

The Witness: Yes, I do so understand it.

The Court: You are instructed to answer the question. Do you refuse to answer the question?

The Witness: I do, your Honor.

The Court: Then I must adjudge you again in contempt of the court.

Specification V.

Q. (By Mr. Neukom): Do you know one Hersel or Herschel Alexander? A. I have met him.

Q. Do you know his first name? How is it spelled according to your best understanding and knowledge?

A. Well, I don't know whether it is the same Mr. Alexander you are referring to. I know a Mr. Alexander. [4]

Q. Do you know a Mr. Herschel Alexander who was a member of the California State Committee of the Communist Party for the year 1950?

A. I know a Mr. Hersel Alexander.

Q. Was he a member of the California State

Committee of the Communist Party for the year 1950?

A. Well, that, again, comes into the same category. I can be asked 500 names, and if my identification of these people who are living people who can be hurt by my public identification of them, as they can be, then I cannot answer it. I am willing to name people who may have died, whose families cannot be——

The Court: You do not need to make a speech about it, Mrs. Yates.

The Witness: Well, I would like to explain.

The Court: You have made several speeches and I will ask you to refrain from any further ones. You have said that over and over again. You are instructed to answer the question.

Mr. Margolis: If your Honor please——

The Court: Will you answer the question or not?

The Witness: No, your Honor.

The Court: You decline to answer the question. I must again hold you in contempt of the court. What do you have to say?

Mr. Margolis: I want to object to your Honor's remarks about speeches and move for a mistrial on the ground it was merely an explanation of her position which she has a right to make.

The Court: The jury are instructed to disregard the comments of counsel and of the court. The witness is entitled to make any explanation that she desires to make. I feel we have heard enough of that explanation. I don't care to hear it any more. I do not care to take up the time with hear-

ing it any more. For that reason I asked you to refrain from repeating yourself.

The Witness: Yes.

Mr. Neukom: Pardon me. Had your Honor finished?

The Court: Proceed.

Mr. Margolis: I assume, your Honor, that if she wishes to add to her [5] explanation, she may.

The Court: Yes, if there is something not repeating, she is certainly privileged to do so, as is every witness, if she explains an answer.

* * *

Specification VI.

Q. (By Mr. Neukom): And is it not likewise true that associated with you as a co-member of the California State Committee for the year 1950 was one, the defendant Al Richmond?

The Witness: That I refuse to answer.

Mr. Branton: Just a minute. May her answer be stricken, your Honor, for the purpose of interposing an objection?

The Court: Yes, it may.

Mr. Branton: I want to object, your Honor, to that question, first, on the ground that Mr. Al Richmond has rested his case and this is just an attempt to elicit evidence as to a defendant who has rested his case and who has no chance and no opportunity to meet evidence which is so elicited. So certainly, on this particular phase, the question would be immaterial, irrelevant and improper.

The Court: Please read the question, Mr. Reporter.

(Question read by the reporter.)

The Court: The objection will be overruled. You are instructed to answer the question.

Mr. Branton: Your Honor, then we make a motion for a mistrial at this time on the ground that the court's ruling is allowing into evidence answers to questions which would elicit evidence as to a defendant who has completely rested his case, and would be a denial of due process to that defendant.

The Court: The evidence is offered as to a defendant who has not rested his case, and I will instruct the jury at the proper time as to the effect of evidence, as to limits upon it. Do you have anything further?

Mr. Branton: The question, your Honor, was specifically asked to a defendant Al Richmond and only that defendant, and that defendant has [6] rested his case entirely.

The Court: The question was as to this witness' association with another person and this witness is under cross-examination. She may be asked about her association with other persons if it is relevant.

Mr. Branton: As long as the record has indicated my motion and objection.

The Court: Yes. The motion is denied. And you are instructed to answer the question.

The Witness: I refuse to answer the question.

The Court: I must again hold you in contempt of the court.

* * *

Specification VII.

Q. (By Mr. Neukom): Is it not likewise true that co-associated with you and as a co-member of the California State Committee for the year 1950 there was also a co-member, one Dorothy Healey?

Mr. Branton: I make the same objection, your Honor, as to any information as to Dorothy Healey as I made a few minutes ago as to the defendant Al Richmond.

The Court: The objection is overruled.

Mr. Branton: Then I want to move for a mistrial, your Honor, on the same grounds heretofore advanced in connection with the defendant Al Richmond.

The Court: The motion is denied. Answer the question.

The Witness: I refuse to answer.

The Court: Then I again adjudge you independently and separately in contempt of court.

Specification VIII.

Q. (By Mr. Neukom): Is it not likewise true that for the year 1950 co-associated with you and as a co-member on the California State Committee of the Communist Party there was a co-member, namely, the defendant Frank Spector?

Mr. Branton: I make the same objection, your Honor, as to the defendant Frank Spector as I have heretofore made to the defendants Al Richmond and Dorothy Healey. [7]

The Court: Overruled.

Mr. Branton: I make a motion for a mistrial,

your Honor, on the same grounds as heretofore advanced to the prior defendants.

The Court: Motion denied. Answer the question.

The Witness: I must refuse to answer that question for the reasons heretofore given.

The Court: I again adjudge you in contempt of the court.

Specification IX.

Q. (By Mr. Neukom): Is it not likewise true that for the year 1950 there was associated with you as a co-member of the California State Committee and as a co-member one Ernie Fox, the defendant here?

Mr. Leonard: I object to that question, if your Honor please, on the grounds that the defendant Fox having rested, it is incompetent, irrelevant and immaterial; and it is a denial of due process as to the defendant Fox, and the Government would in effect be permitted to reopen its case against him after the closing of his case, after he has rested and in reliance upon the closing of his case.

The Court: Overruled. Answer the question.

Mr. Leonard: And on behalf of the defendant Fox, and only on behalf of the defendant Fox, at this time I make a motion for a mistrial on the ground that the Government having rested and he having rested, it cannot reopen its case as to him.

The Court: Motion denied.

Defendant Schneiderman: Your Honor, is there any reason why Mr. Neukom cannot ask the witness a list of names he wants to ask, without asking each individual question as to each individual name?

Mr. Neukom: It might be compound.

The Court: You are instructed to answer the question.

The Witness: I refuse to answer the question.

The Court: I must adjudge you again in contempt of the court. [8]

Specification X.

Q. (By Mr. Neukom): Is it not likewise true that in the year 1950 and co-associated with you and as a co-member of the California State Committee for that year 1950 there was Mickey Lima, the defendant here, as a member of that committee?

Mr. Margolis: I object to that question, if your Honor please, on the grounds previously stated with respect to similar questions by Mr. Branton and Mr. Leonard.

The Court: Overruled.

Mr. Margolis: And I hereby move for a mistrial upon the behalf of the defendant Mickey Lima on the grounds previously stated by Mr. Branton and Mr. Leonard.

The Court: The motion is denied.

Mr. Branton: I would also like to object to that question as being compound, your Honor.

The Court: Please read the question, Mr. Reporter.

(Question read by the reporter.)

The Court: Overruled. I will reverse that ruling. It is compound. Sustained.

Q. (By Mr. Neukom): Is it not likewise true that for the year 1950 Mickey Lima, also known as

Albert Jason Lima, was a co-member of the California State Committee for the year 1950?

The Witness: I refuse to answer.

Mr. Margolis: If your Honor please, I object to that upon the grounds previously stated with respect to the last question and also on the ground that it is immaterial.

The Court: Overruled.

Mr. Margolis: I hereby make a motion for a mistrial on behalf of the defendant Mickey Lima on the grounds last stated, your Honor.

The Court: Motion denied. You will answer the question.

The Witness: I refuse to answer.

The Court: Then I adjudge you again in contempt of the court: [9]

Q. (By Mr. Neukom): When I referred to Mickey Lima, I assume that you understood that I was referring to the one and the same as the defendant Albert Jason Lima?

A. Yes, I did.

* * *

Specification XI.

Q. (By Mr. Neukom): Did you know one Celeste Strack?

A. Yes, I did.

Q. Do you know where Celeste Strack is now?

A. I haven't any idea where she is now.

Q. Was not Celeste Strack an active member of the Communist Party during the period of time you have been a member of the Communist Party in the vicinity of San Francisco?

Mr. Margolis: Objected to on the ground it is

incompetent, irrelevant and immaterial, and no relation to any issues, merely asking to get more names into the record.

The Court: Sustained as compound.

Q. (By Mr. Neukom): Did you know Celeste Strack in the vicinity of San Francisco?

A. Yes, I did.

Q. And for how many years did you say?

Mr. Margolis: We object to it on the grounds that this is immaterial, no relation to any issue in the case.

The Court: Overruled.

A. Well, I don't remember for sure how long I have known some people. It might be eight years, seven years.

Q. (By Mr. Neukom): Did you know that Celeste Strack was for a number of years state educational director of the Communist Party of the State of California?

The Witness: I refuse to answer.

The Court: You are instructed to answer the question. [10]

The Witness: I still refuse, your Honor.

The Court: I must adjudge you again in contempt of the court.

It Is Ordered, Adjudged and Decreed that the defendant Oleta O'Connor Yates has been found guilty of contempt of Court through refusal to answer questions put to her, after direction by the Court so to answer, to wit, Specifications I to XI above; and

It Is Further Ordered, Adjudged and Decreed

that the said Oleta O'Connor Yates has been found guilty of contempt of Court separately as to each specification hereinbefore numbered Specifications I to XI.

Further proceedings relative to this matter shall be deferred until further order of the Court.

Dated this 8th day of July, 1952.

/s/ WM. C. MATHES,
United States District Judge.

Approved as to Form:

/s/ B. MARGOLIS.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 8, 1952. [11]

[Title of District Court and Cause.]

MINUTES OF THE COURT, AUGUST 8, 1952
SENTENCING

Proceedings:

Further proceedings re criminal contempt and sentencing of the defendant. Defendant and counsel are present. Defendant Yates makes a statement. Counsel and Court make statement. Attorney Margolis moves for reconsideration.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for

a period of one year in a jail type institution to be selected by the Attorney General of the United States or his authorized representative for each of the eleven separate contempts of which the defendant stands convicted herein.

It Is Further Adjudged that the eleven separate one-year jail sentences herein imposed for the eleven criminal contempts of which the defendant stands convicted shall run concurrently and that such concurrent sentences shall commence upon the defendant's release from custody following execution of the five-year sentence of imprisonment imposed August 7, 1952, upon the defendant in case No. 22131 pending in this Court.

EDMUND L. SMITH,
Clerk.

By /s/ P. D. HOOSER,
Deputy Clerk. [12]

District Court of the United States for the Southern
District of California, Central Division

No. 22379—Criminal
[18 U.S.C. § 401]

UNITED STATES OF AMERICA,

vs.

OLETA O'CONNOR YATES.

JUDGMENT AND COMMITMENT

On this 8th day of August, 1952, came the attorney for the government and the defendant ap-

peared in person and by counsel, Ben Margolis, Esquire.

It Is Adjudged that the defendant has been convicted of eleven separate criminal contempts [18 U.S.C. § 401] committed in the presence of the court [Fed. R. Crim. P. 42(a)] by wilful refusal to answer eleven questions in disobedience of the order of the court so to do, as shown by that certain "Order, Judgment and Certificate of Criminal Contempt" filed on July 8, 1952, and incorporated by reference the same as if set forth in full in this judgment and commitment; and the court having asked the defendant whether she has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one year in a jail type institution to be selected by the Attorney General of the United States or his authorized representative for each of the eleven separate contempts of which the defendant stands convicted herein.

It Is Further Adjudged that the eleven separate one-year jail sentences herein imposed for the eleven criminal contempts of which the defendant stands convicted shall run concurrently and that such concurrent sentences shall commence upon the defendant's release from custody following exe-

cution of the five-year sentence of imprisonment imposed August 7, 1952, upon the defendant in case No. 22131 pending in this court.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Filed August 8, 1952.

/s/ WM. C. MATHES,

United States District Judge.

EDMUND L. SMITH,

Clerk.

By /s/ P. D. HOOSER,

Deputy Clerk.

[Endorsed]: Filed August 8, 1952. [13]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Oleta O'Connor Yates, 419 Peru Street, San Francisco, California.

Name and address of appellant's attorney: Ben Margolis, 112 West Ninth Street, Room 825, Los Angeles, California.

Offense: Eleven separate criminal contempts (18 U.S.C. Sec. 401) committed in the presence of the

court (Fed. R. Crim. P. 42(a)) by wilful refusal to answer eleven questions in disobedience of the order of the court so to do, as shown by that certain "Order, Judgment and Certificate of Criminal Contempt" filed on July 8, 1952, and incorporated by reference the same as if set forth in full in this judgment and commitment. [14]

Concise statement of judgment or order, date and sentence:

One year in a jail type institution to be selected by the Attorney General of the United States or his authorized representative for each of the eleven separate contempts of which the defendant stands convicted herein. It Is Further Adjudged that the eleven separate one-year jail sentences herein imposed for the eleven criminal contempts of which the defendant stands convicted shall run concurrently and that such concurrent sentences shall commence upon the defendant's release from custody following execution of the five-year sentence of imprisonment imposed August 7, 1952, upon the defendant in case No. 22131 pending in this court. Judgment dated August 8, 1952, and filed in the Office of the Clerk of the United States District Court for the Southern District of California, Central Division, on August 8, 1952.

Name of institution where now confined, if not on bail: Los Angeles County Jail.

I, the above-named appellant, hereby appeal to

the United States Court of Appeals for the Ninth Circuit from the above-stated judgment and order.

Dated: August 13, 1952.

/s/ BEN MARGOLIS,
Counsel for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 13, 1952. [15]

[Title of District Court and Cause.]

STIPULATION AS TO RECORD

It Is Hereby Stipulated, Consented and Agreed by and between the attorneys for the appellant and appellee herein, respectively, that the record on appeal herein shall include all the proceedings and evidence in the action, consisting of the following:

1. Order, Judgment and Certificate of Criminal Contempt, filed July 8, 1952.

2. Judgment and Commitment, filed August 8, 1952.

3. Notice of Appeal.

4. Reporter's Transcript of Proceedings in the action herein.

5. This stipulation and any other stipulation hereafter made concerning the record on appeal herein.

It Is Further Stipulated and Agreed by and between counsel for the respective parties herein that either side may refer so far as is pertinent hereto

to portions of the testimony contained in the proceedings entitled *United States v. Schneiderman, et al.*, No. 22131 Cr., [17] in their briefs or arguments on appeal.

Dated: This 29th day of August, 1952.

BEN MARGOLIS,

/s/ BEN MARGOLIS,

Attorney for Appellant.

WALTER S. BINNS,

U. S. Attorney.

By /s/ NORMAN W. NEUKOM,

Attorney for Appellee.

[Endorsed]: Filed September 4, 1952. [18]

In the United States District Court, Southern
District of California, Central Division

No. 22,379—Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OLETA O'CONNOR YATES,

Defendant.

Honorable William C. Mathes, Judge Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

For the Plaintiff:

WALTER S. BINNS,

United States Attorney;

RAY H. KINNISON,

Asst. United States Attorney;

LAWRENCE E. BAILEY,

Spec. Asst. to Attorney General.

For Defendant:

BEN MARGOLIS, ESQ.

Friday, August 8, 1952—11:00 A.M.

The Court: Is it stipulated, gentlemen, that the
defendant Yates is present and her counsel?

Mr. Margolis: Yes, your Honor, so stipulated.

Mr. Binns: So stipulated, your Honor.

The Court: Has that certificate which the Government prepared ever been settled? I do not recall now whether that was signed and filed or not?

Mr. Bailey: Your Honor, I believe it was just submitted to the other side and to your Honor to look over. Actually, you see, the certificate could not be. The ordinary way, I think, is to have the judgment, as well as the certificate, all incorporated into one. But we prepared one in which we left out the judgment because we, of course, did not know what the judgment was. That was submitted to your Honor and you just took it, as I understood it.

The Court: Where is the original?

Mr. Bailey: This is the criminal contempt you are talking about, of course?

The Court: Yes.

Mr. Margolis: It is my recollection, your Honor—and it may be in error, that I approved it as to form.

Mr. Bailey: That was the civil contempt, your Honor.

Mr. Margolis: Also on the criminal contempt, your Honor, [2*] it is my recollection.

The Court: That is my recollection, but I do not recall whether I signed it and whether it was filed or not.

Mr. Margolis: That I do not recall, your Honor.

The Court: Was it, Mr. Clerk?

The Clerk: Yes. Here is the original.

The Court: You have a separate proceeding on it?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Clerk: Yes, your Honor.

The Court: I am sorry. If I had left it to the Clerk—well, call that case.

The Clerk: Case No. 22,379—Criminal—United States of America vs. Oleta O'Connor Yates, for further proceedings re criminal contempt.

Mr. Margolis: Ready for the defendant.

The Court: Is it stipulated the defendant and her counsel are present?

Mr. Margolis: So stipulated.

Mr. Kinnison: So stipulate.

The Court: Pursuant to the document entitled: Order, Judgment and Certificate re Criminal Contempt, filed July 8, 1952, this proceeding being conducted to determine what punishment shall be imposed and what further proceedings to be had in this matter, the defendant Oleta O'Connor Yates having been found guilty of contempt—11 separate specifications, are there? [3]

Mr. Binns: Yes, your Honor.

The Court: —of 11 separate contempts of court for wilful refusal to answer questions in compliance with the orders of the court.

Section 401, Title 18, United States Code, provides that: "

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

"(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

"* * *

"(3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command."

The defendant Yates is now before the court for determination of the punishment to be imposed. Does she or her counsel have anything to say?

Mr. Margolis: We are ready, your Honor.

I think it would probably be repetitious, as far as I am concerned, to say the things that I have previously said on this matter when the civil contempt was under discussion. I think that my previous statements apply and I will not take the time of the court to repeat them.

Mrs. Yates may have a word or two to say.

Defendant Yates: Your Honor, at the time the citations [4] took place I stated that I had no intent to show disrespect, much less contempt, for the court; and I likewise stated the reasons which impelled me to that course of action.

I believe that those reasons still hold good, my position still holds good, and it would be wasting the time of the court to repeat what has already been stated.

I am ready to be sentenced.

The Court: Does the Government have anything to say?

Mr. Binns: Your Honor, this is a matter which has concerned me a great deal. I am sorry for Mrs. Yates. I have a feeling that she is not exercising her own judgment or determining her own course of action in the action she has taken here.

I feel that she is a person who has accepted discipline of the Communist Party so long that she can't shake off those shackles.

It is a very serious matter, however, I feel, and the processes of justice require that persons should obey the orders of the court; that the court cannot function without evidence and the evidence must come, in our system, from the questions and answers that are legitimately and properly asked and answered.

I just can't agree with her statement that she did not mean to be in contempt of court. I think she was given every opportunity to understand the situation. [5]

Mr. Margolis: Has Mr. Binns finished?

Mr. Binns: Yes, sir.

Mr. Margolis: I would like to say, your Honor, once again, that we have Mr. Binns standing up here and just solely on the basis of his own dictate saying that this is what induced Mrs. Yates to act, rather than her own statement, that she had a sense that she could not injure other people.

I think that this is an improper attempt to influence the court, to prejudice the court against Mrs. Yates; and I think that the court ought to disregard statements of that kind which are not based upon any evidence but are simply based upon the assertion of the United States Attorney. I think we have had enough of that.

Mr. Binns: Your Honor, my feeling was, in making my statement, as I was trying to impress the court, to temper justice with mercy. I had no

feeling of influencing the court to be unduly harsh to Mrs. Yates.

The Court: I had hoped by this time that Mrs. Yates might be willing to purge herself; that she might be prompted to do so.

Anyone can have an appreciation of the sportsmanlike spirit that might prompt a person not to wish to be an informer. All witnesses in court who swear to tell the truth, the whole truth, and nothing but the truth become, in the liberal sense, informers of necessity. [6]

Mr. Margolis: May I be heard for a moment on that, your Honor?

The Court: Yes, you may.

Mr. Margolis: On the question of Mrs. Yates purging herself, the trial having been completed, your Honor, her answering the questions at this point would not in any way affect the administration of justice; it would not aid any jury. It would simply be her doing not even for anything that would aid in the processes of justice, doing the thing which her conscience has said she can't do.

The Court: The only purpose of the purge would be to purge herself to the extent that she bows to the authority of the court.

Contempt is a defiance of the authority of the court and the authority of the court must be vindicated.

It could have no effect upon this proceeding and need not be accepted as a purge, because of the fact that the time has passed, as you point out, Mr.

Margolis, for the administration of justice in this case to be affected by it.

Nonetheless, as I view it, the court, in its discretion, might treat answers now to the questions as a vindication of judicial authority and treat it as purged.

Mr. Margolis: Your Honor, may I—excuse me.

The Court: I take it from the defendant's statement that she is as adamant now as she was the day the questions were [7] put.

Mr. Margolis: Your Honor, may I point out that at the time she did this, obviously she knew that her chances with the jury were not increased by taking this type of a position; that, as a matter of fact, she was risking endangering herself, and she did this on the basis that she could not cause other people to lose their jobs and be persecuted, as she had seen it done.

It seems to me she has already served something like 42 or 43 days—I don't know the exact period but it is something like that—in jail; and in the light of that and in the light of the fact that her motive was not one which would help her in this, was not one which could have helped her in any way, but was one where she felt she would be doing a serious injury to other people—it is not merely a question of being an informer, your Honor, of informing on other people, but where she, in her own conscience, felt that other people who had never done, according to her understanding, anything wrong could be persecuted, could lose their jobs,

that she felt she just could not do this to people who had never done anything wrong, to help herself.

She would have helped herself, I believe, in every way from the standpoint of presenting the matter. She would have helped herself in avoiding the contempt, and in not giving the prosecution the argument that she did not answer [8] all questions she would have helped herself. Her motive was not to help herself, but she felt that these people had never done anything wrong. This is what she believes: That they had never hurt anybody, and yet she might be the one who, by testifying against innocent people, would cause them to suffer such injuries as losing their jobs and of having all sorts of other penalties imposed upon them. And she felt she could not bring herself to do this.

It seems to me that this is one of the situations in which the penalty already imposed ought to be considered adequate.

I am not discussing now the question of your Honor's right to order her to answer the questions, or order this contempt. I am discussing simply what the penalty ought to be under these circumstances. I hope that is clear to your Honor.

The Court: Yes. It seems to me this is somewhat analogous to a situation where well-meaning young people, some who call themselves Jehovah's Witnesses and others who won't claim conscientious objections to war but who refuse to obey the law. To these, in spirit, they are right; actually, they are anarchists. They defy all law except the law they want to obey.

If we all did that, it would not take much reflection to see where our system would be.

Mrs. Yates, as I view it, is in the position that she will answer the questions, she will obey the orders of the [9] court, in the last analysis, that she feels she should obey and she will defy those which she wishes to not obey.

Mr. Margolis: On that, your Honor, may I respectfully submit that the record is to the contrary. There may have been many questions that were put to her that she may have thought were improper questions, that she may have thought should not be asked in a court of law.

I think, if you asked her about her conscience, she would say many of these questions have no place in a court of law; that would be her opinion. Nevertheless, she proceeded to answer all of the questions, every question that was put, and the only questions she answered, not simply to say "I will make up my mind to every question whether I want to answer it or not," it was not that kind of situation.

The Court: That is the same situation, isn't it, with respect to these Jehovah's Witnesses? They obey all laws of the land except one.

Mr. Margolis: They are trying to help themselves, not somebody else, by that.

The Court: Well, they think they are trying to help all human kind.

Mr. Margolis: But themselves, too, and she had nothing to gain.

The Court: Moreover, they think they are obeying the word of God. [10]

Mr. Margolis: I suppose those factors all should

be given consideration because of that kind of a case.

My point here is, your Honor, that there has already been punishment. I know it was for the purposes of coercion, but jail bars are jail bars whether their purposes are coercive or otherwise, at least to the individual.

To the individual the label placed upon the sentence makes no practical difference, because the effect, the deprivation of liberty, is equally great in one case as in the other.

The only point I am making, your Honor, is that in a situation like this where, actually, your Honor, in his discretion, could even have ruled the other way on the questions—I have authorities to that point and I don't want to argue that because that issue is really not before your Honor at this point—your Honor, in his discretion, could have ruled the other way. And answers to these questions, certainly a refusal to answer, if they affected the outcome at all—and I doubt seriously whether they affected the outcome of this case at all—but if they affected the outcome at all, affected it adversely to this defendant.

And it is not the sort of a situation where a defendant gets on the stand and answers a few questions, but where it comes to questions that are going to be the most damaging, like: "Did you have the gun?" "I refuse to answer it." But it is a situation where she was trying, rightly or wrongly, [11] trying to do what her conscience required her to do. Sometimes that constitutes a violation of law, but

the fact that it is a matter of conscience, the fact that it is a matter in which she gained nothing, the fact that, from the standpoint of the prosecution, the prosecution got exactly what it wanted in this case, are matters that should be taken into consideration, it seems to me, in determining the punishment.

The Court: But, as to some of these matters, Mr. Margolis, without taking the time to pick out which, as to some of them they were people whose remarks were quoted by Government witnesses. Glickson was one, or Ida Rothstein, where a Government witness said that Glickson or Rothstein, as the sub-chairman, or in some capacity said something damaging to the defense.

On direct examination Mrs. Yates was asked, as I recollect the testimony, in effect: I call your attention to the statements made by some club chairman, Glickson or someone else; does that accord with your understanding of the aims and objectives and program of the Communist Party? And Mrs. Yates would say, in effect, why, that is ridiculous. No one in their right mind who is a member of the Communist Party and knows anything about it would say such a thing.

Now, the Government was entitled on cross-examination to show, if they could, that that person whom Mrs. Yates impliedly said was a very foolish person was a friend of Mrs. Yates of [12] long standing who had worked with her, whatever the proof would show. We do not know. That is the problem, we do not know; so it was more than just a mere refusal to name people.

Mr. Margolis: May I call your Honor's attention to this: With respect to every person she was asked about: "Do you know?" she answered that question.

She was asked: "How long do you-know them?" and I think most of them she admitted that her knowing them ran back many years. I don't remember the exact evidence. But I think in some cases, 1937, 1940. She testified freely to her knowing them.

The testimony that they were Communists was in the record. No attempt was made to contradict that testimony.

The only thing that she could have added would have been to say, she, herself, to say they were Communists. Her association with them, the fact that she was a Communist, of course, was not denied. It was asserted on direct examination. The fact she was an official and her association with them was admitted.

It was only when it came to the one question as to which she would in effect be in the position where, if these people lost their jobs, etc., it could be in part attributed to her, that she stopped. These she questioned. She gave them the association.

The point that your Honor made, I think, is a valid one. [13] And frankly, when I discussed this with Mrs. Yates I advised her when I talked, your Honor, I thought that your Honor, in his discretion, could say that the question need not be answered.

I said, if you ordered it answered, it would be a problem of contempt; but that if she decided not to answer—then she said, herself, she wanted noth-

ing to gain by this; that she wanted to answer every possible question as far as she was concerned. And yet, the way your Honor just analyzed the matter, she admitted the very thing, this long association. It would have been just as easy for her to say, if she was trying to protect herself or help herself in the case: "I won't answer any questions about those people." She did not do that, your Honor. She said, "I know them. I have known them since 1937 or 1940." One or two of the people she did not. She said she did not know them.

There is no indication, of course, that any of her answers with respect to those were in any way not truthful answers. So, your Honor, she went an awful long way in actually giving the prosecution what it wanted in this situation from the standpoint of the argument it wanted to make. It was perfectly free to make that argument. In our argument when we argued to the jury, at no time did we try to assert, for example, that these people were not Communists, that there was any evidence they were not Communists. [14]

Our argument was, if those statements were made, if she did not agree with them, and that she ought not to be bound by statements made outside of her presence. That was our argument to the jury. We tried to take no advantages whatsoever by the situation.

As I see the result, her refusal, if anything, to answer questions, she was hurt by it; she was not helped by it in any way.

The Court: Anything further?

Mr. Binns: Nothing further, your Honor.

Mr. Margolis: Nothing further. [15]

The Court: It is the judgment of the court, Oleta O'Connor Yates, you having been convicted of 11 separate contempts of the court for wilful refusal to answer questions in response to the order of the court, that you be committed to the custody of the Attorney-General of the United States or his authorized representatives for imprisonment in a jail type institution to be selected by the Attorney-General of the United States for the period of one year for each of the 11 specifications.

It is further adjudged that the one-year terms of imprisonment imposed for each of the 11 specifications shall commence and run concurrently.

It is further adjudged that the 11 concurrent one-year jail sentences just imposed for criminal contempt shall commence upon your release from custody following execution of the five-year term of imprisonment imposed on August 7, 1952, in case No. 22,131 pending in this court.

You are now committed to the custody of the Marshal to serve those concurrent sentences.

Mr. Margolis: Your Honor, I wish to move at this time for reconsideration and point out one additional factor.

I want to say, your Honor, and I want to be frank with the court, but I am a little sick as to the result of this. I just never for a single instant thought that this could happen. [16]

There have been other cases in which there have been refusals to answer a number of questions, cases of other judges where there was a contempt

of court identical with the one here, with an identical kind of a case.

Judge Medina gave 30 days. Judge Chestnut gave 30 days, your Honor. They felt that that was ample to vindicate the dignity of the court and they took into consideration——

The Court: Not the "dignity," the authority.

Mr. Margolis: Very well, your honor. I substitute the word "authority."

They felt that that was sufficient to vindicate the authority of the court. It seems to me, your Honor, that in this case to impose a sentence of one year on top of a sentence of five years that has already been imposed, and in addition, on top of the 42 or 43 days that have already been served, and in the light of what other judges, whom your Honor must consider as being somewhat reasonable human beings, have imposed is really to select her for unduly harsh and cruel treatment I think is not warranted by the facts and is not warranted by the precedent of other judges, your Honor.

And I think your Honor ought to take into consideration that other judges have not felt that this sort of treatment is necessary in order to vindicate the authority of the court.

The Court: Mr. Margolis, I respect the opinions of other judges. This court will be here on this bench, will be here [17] long after I am gone. I am a servant to vindicate the authority of the court.

I hope Mrs. Yates will yet purge herself. I think, in offering to accept her answers now as a purge is a humane, merciful thing to do under the circumstances.

I am not interested in imprisoning Mrs. Yates. I am interested in vindicating the authority of this court, which I feel must be vindicated when anyone wilfully refuses to obey a lawful order of the court.

If she at any time within 60 days, while I have the authority to modify this sentence under the Rules, wishes to purge herself, I will be inclined even at that late date to accept her submission to the authority of the court.

Mr. Margolis: Your Honor, I just want to say this one thing: There are other things in life besides authority of this court that are important. I am not attacking the authority of this court, the eminence of the court.

But also there is the dignity of human beings that ought to be given some consideration. And I think what this court has done today is to place the dignity of the court above the dignity of human beings; and I think that this actually lowers the dignity of the court rather than raises it.

This is my opinion as to the effect of this kind of a sentence, your Honor.

The Court: Anything further, gentlemen? [18]

Mr. Binns: Nothing further, your Honor.

The Court: Anything further, Mr. Clerk?

The Clerk: That is all on the calendar, your Honor.

The Court: Court will adjourn.

(Whereupon an adjournment was taken in the above-entitled matter.)

[Endorsed]: Filed September 12, 1952. [19]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 18, inclusive, contain the original Order, Judgment and Certificate of Criminal Contempt; Judgment and Commitment; Notice of Appeal and Stipulation Designating Record on Appeal and a full, true and correct copy of Minutes of the Court for August 8, 1952, which, together with copy of reporter's transcript of proceedings on August 8, 1952, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 12th day of September, A.D. 1952.

[Seal]

EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13541. United States Court of Appeals for the Ninth Circuit. Oleta O'Connor Yates, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed September 15, 1952.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

[Title of Court of Appeals and Cause.]

**DESIGNATION OF RECORD ON APPEAL
AND CONCISE STATEMENT OF POINTS
ON APPEAL**

Oleta O'Connor Yates, the appellant herein, hereby designates the entire record to be printed on appeal.

The following is a concise statement of the points on which appellant intends to rely on the appeal:

I.

The sentence imposed is vague and indefinite as to the time of its commencement and is, therefore, void.

II.

Contrary to the contentions of the appellee, service of the sentence, if any, in this matter must be deferred until appellant's release from custody following execution of the five year sentence of imprisonment imposed August 7, 1952, upon the appellant herein in the case of United States of America vs. Schneiderman, et al., in the District Court of the United States for the Southern District of California, Central Division.

III.

The sentence of one year imposed upon appellant is excessive and arbitrary, constitutes cruel and unusual punishment and is a denial of due process of law in violation of the Fifth Amendment of the Constitution of the United States.

IV.

The sentence of one year imposed upon appellant is arbitrary and void in that it was predicated in whole or in part upon the refusal of the appellant to purge herself of contempt after the completion of the trial in which the alleged contempt of refusing to answer questions was committed and, therefore, appellant could no longer purge herself of contempt.

V.

The judgment of contempt was not supported by the evidence and is arbitrary and void in that the questions which appellant refused to answer were incompetent, irrelevant and immaterial and in that her refusal to answer did not impede the course of the trial or deprive the prosecution of anything to which it was entitled.

Dated: September 24, 1952.

Respectfully submitted,

MARGOLIS AND McTERNAN,

By /s/ R. MARGOLIS,

Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 25, 1952.

[fol. 42] Minute Entry of Argument and Submission—
July 14, 1955. (Omitted in Printing).

[fol. 43] IN UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND
FILING AND RECORDING OF JUDGMENT—July 26, 1955

Ordered that the typewritten opinion this day rendered
by this Court in above cause be forthwith filed by the Clerk,
and that a Judgment be filed and recorded in the minutes
of the Court in accordance with the opinion rendered.

[fol. 44] IN UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 13,541

OLETA O'CONNOR YATES, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

OPINION—July 26, 1955

Upon Appeal from the United States District Court
for the Southern District of California
Central Division

Before: STEPHENS, FEE and CHAMBERS, Circuit Judges
JAMES ALGER FEE, Circuit Judge:

On July 8, 1952, an order, judgment and certificate of
criminal contempt was entered as to Oleta O'Connor Yates
upon eleven specifications of refusal to respond to questions
put to her on cross-examination after a direction by the
court while she was a witness in the trial of the case entitled
on the records of that court United States vs. Schneider-
man, et al., No. 22131-C.D. This certificate recited these

refusals "were committed in the actual presence of the Court and were seen or heard by the Court."

After the sentence of five years in the principal case was imposed upon Mrs. Yates on August 7, 1952, in the main case in which she was a defendant (Yates vs. United States, — F. 2d —), she was in custody thereunder, together with the other convicted defendants. The court held a hearing on August 8, 1952, at which she was present, personally, and was represented by counsel. Based upon the "order, judgment and certificate of criminal contempt" of July 8 under 18 U.S.C.A. § 401, hereinabove referred to, the court adjudged Mrs. Yates had been convicted of eleven separate criminal contempts therein set out. The defendant was thereupon committed to the custody of the Attorney General of the United States for one year for each of such contempts. These sentences were made to run concurrently with each other, but all were made to take effect upon the release of defendant from custody following execution of the five year sentence of imprisonment imposed August 7, 1952, upon this defendant in Case No. 22,131, United States vs. Schneiderman.

Appeal was taken from this judgment of criminal contempt on August 13, 1952.

The proceedings of the court were fair and in accordance with the precedents. There was due process at every stage. When the matter came on for hearing the day after sentence in the main case, the court had power to impose appropriate sentence for the contempts specified in the order of July 8.

There was a lapse of time between the commission of the disobedience of the order in open court and the entry of the judgment establishing each refusal as a criminal contempt on July 8 and the entry of sentence on each of the contempts on August 8. It is now well established practice for the trial judge to reserve punishment of contempts by participants in a criminal trial. The dangers surrounding such procedure are not legal in nature, but arise in policy. None was apparent here.

A point was made in the trial court that, since defendant was in custody after June 26, when she was committed, until she had given answer to four questions which were propounded to her upon that date, the time so spent should have

been applied in mitigation of this punitive sentence. But that measure applied only to the four questions, as noted above, propounded on that date. These eleven questions, each of which was propounded upon June 30, constitute incidents separate and distinct from the first four. Furthermore, verdicts of guilty were returned in the main case against Mrs. Yates and the other defendants on August 6, and she was held in jail on that charge pending sentence. The custody on the first contempt charge ended with the discharge of the jury. Neither the coercive custody on the first contempt charge nor yet confinement after verdict upon the main charge was relevant to the criminal sentences here.

The main contention of defendant is that, when this punitive sentence was imposed, it was no longer possible for [fol. 46] defendant to purge herself because the trial had ended and that it is improper for the court to use criminal contempt as a coercive rather than a punitive proceeding.

While it is true the court did speak of his disposition to release the defendant from the adjudication of contempt on these specifications in the event she bowed to the authority of the court, this was a suggestion of grace. It must be clearly recognized that it was no longer possible for the situation to be restored so that she could testify. In another proceeding as to other contempts, the trial judge indicated his opinion that he had power to imprison defendant until the questions there were answered. In this proceeding, there was no attempt at coercion to require the answers.

The persistent and recalcitrant refusal to bow to the authority of the august tribunal, even when offered grace after the trial was over, is highly illuminating.

The next contention of defendant takes color therefrom. Defendant, notwithstanding her defiance of the orders of the court and her refusal of grace, insists that the sentence of one year is excessive and arbitrary, constitutes cruel and unusual punishment and is a denial of due process of law in violation of the Eighth and Fifth Amendments to the federal Constitution.

The defendant had been committed for coercive purposes on June 26 to compel her answers to certain questions. Four days later, while still in custody and still under cross-

examination, she committed the contempts certified in this case by refusal to answer other questions. The trial judge found from her own statement in open court on the day of sentence that "she is as adamant now as she was the day the questions were put."

The processes of justice require that all witnesses in a criminal case should obey the legal orders of the court. These processes cannot function without evidence adduced by legitimate questions and answers thereto.

In our system, there is an impregnable bastion erected to protect a defendant not only against self incrimination, but even against a compulsion to testify. As long as a defendant remains within the barbican of this guarantee, protection is absolute. The prosecutor cannot comment on this silence.

[fol. 47] All the defendants in this case except Mrs. Yates accepted this protection. She voluntarily waived it. She knew the rule. She knew if she testified in order to attempt to clear herself and the other defendants, that she would be asked if they belonged to the Communist Party.

The various suggestions now made that the questions were not material, that the failure to answer did no harm, that she and the other defendants were convicted in any event are creations of straw. Technically, the questions were proper and material.

Her own alleged reasons are of no more validity. She said:

"Well, I am quite prepared to discuss anything that I did, anything that I said, but I am not willing to provide names and identities of people other than those that I have indicated, because I believe that in the case of the other defendants their case is already rested and I would only be contributing toward adding to the prosecution case against them, and I think that that would be becoming a government informer and I cannot do that.

" . . .

"The Court: You are instructed, Madam, to answer that question.

"The Witness: I understand, your Honor. And for the reasons I have given, because I just will not be an in-

former, I will not play the role of a witness for the Government, and I will not add to the prosecution's case against people who have rested, who are defendants and who are putting on no further defense. I am sorry, your Honor, I cannot answer that question.

"The Court: You understand the possible consequences of your refusal to answer, I take it?"

"The Witness: I am afraid I do, but the possible consequences, grim as they may be, are not as bad as going around hanging your head in shame for the rest of your life, because you will not be an informer.

"* * *

"The Witness: Well that is a question which, if I were to answer, could only lead to a situation in which a [fol. 48] person could be caused to suffer the loss of his job, his income and perhaps be subjected to further harassment, and in a period of this character, where there is so much witch-hunting, so much hysteria, so much anti-communism, I am sorry I cannot bring myself to contribute to that.

"* * *

"However many times I am asked and in however many forms, to identify a person as a communist, I can't bring myself to do it, because I know it means loss of job, I know that it means persecution for them and their families, I know that it even opens them up to possible illegal violence, and I will not be responsible for that. I will not do it.

"* * *

"As I stated this morning, I would again be putting myself in the role of a government informer if I were to start discussing any of the questions that pertain to defendants who have rested their case, and do not propose to put on any further defense, and for that reason I refuse to answer.

"* * *

"A. No. I am sorry I can't for the same reasons that I advanced last week. I feel that these people are in a position where my identification of them as Communists would do them an inestimable amount of damage. I am willing to give names of people whom I know I cannot hurt, but where it is a question of damaging their

interests, of harming their ability to make a livelihood, of hurting their families, No.

"Q. People that are employed by the Communist Party would not be discharged, would they, by having their names revealed?

"A. People who may be employed by the Communist Party would not be discharged by having their names revealed, but members of their families can suffer the results of it in many different ways.

"* * *

"Well, that, again, comes into the same category. I can be asked 500 names, and if my identification of these people who are living people who can be hurt by my public identification of them, as they can be, then I [fol. 49] cannot answer it. I am willing to name people who may have died, whose families cannot be * * *."

It must be remembered she was being asked about persons with whom she was charged as a co-conspirator in agreement to teach and advocate the overthrow and destruction of the government of the United States by force and violence as speedily as circumstances would permit. A defendant who chooses to take the stand cannot pick and choose the questions to which he will give answer. A person accused of murder jointly with another who is alleged to have actually done the killing cannot refuse to answer as to association or acts of the latter on the ground that he would hang his head in shame if he testified for the government against a person he thought unjustly accused. The guarantee against being required to testify would be turned into a sword instead of a shield.

The court had a right to take into consideration the defiant and recalcitrant attitude of defendant in assessing the penalty. A defendant in an ordinary criminal case who attempted so to protect his confederates would be dealt with severely, and necessarily so. It is far from our thought that a trial court cannot maintain its essential authority where the deliberate defiance arises from loyalty to political confederates or the religion of communistic determinism.

The sentence was severe. Its control is not in our province. It certainly indicates no abuse of discretion. It is true the vindication of the authority of the court would

have been better subserved by an immediate commitment rather than confinement after release on the sentence in the main case. This Court has no power to control the discretion of the trial judge in this respect either.¹

Affirmed.

[File endorsement omitted.]

[fol. 50] IN UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 13,541

OLETA O'CONNOR YATES, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

JUDGMENT—July 26, 1955

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

[File endorsement omitted.]

¹ United States vs. Bollenbach, 2 Cir., 125 F.2d 458, 459.

[fol. 51] IN UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

MINUTE ENTRY OF ORDER DENYING PETITION FOR REHEARING
—November 2, 1955

On consideration thereof, and by direction of the Court, It is Ordered that the petition of Appellant, filed August 24, 1955, and within time allowed therefor by rule of Court for a rehearing of the above cause be, and hereby is denied.

[fol. 52] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 53] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1955

No. 547

[Title omitted]

ORDER ALLOWING CERTIORARI.—Filed January 16, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is assigned for hearing immediately following Nos. 308, 309, and 310.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(6656-3)

IN THE
Supreme Court of the United States

October Term, ~~1956~~ 1957

No. 547 182

OLETA O'CONNOR YATES,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit.

MARGOLIS, McTERNAN & BRANTON,
✓ By BEN MARGOLIS,
112 West Ninth Street,
Los Angeles 15, California,
Attorneys for Petitioner.

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I.

The separate judgment of contempt rendered against petitioner for refusal to answer similar questions for the same reasons upon the third day of cross-examination was illegal and void, deprived petitioner of her liberty without due process of law and placed petitioner twice in jeopardy for the same offense, all contrary to law and to the due process and double jeopardy provisions of the Fifth Amendment.... 18

II.

Assuming arguendo that the refusal to answer similar questions on June 30 constituted separate contempts, the trial judge was without power to impose punitive punishment in proceedings essentially civil in character and purpose..... 23

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III.

The sentence of one year imprisonment for contempt under the circumstances here was so harsh, grossly excessive and arbitrary as to constitute a manifest abuse of discretion, cruel and unusual punishment and a deprivation of petitioner's liberty without due process of law in violation of the due process provisions of the Fifth Amendment and the provisions of the Eighth Amendment..... 26

IV.

Since the sentence of the trial judge was predicated essentially upon the refusal of petitioner to answer the questions after the conclusion of the trial for the continued benefit of the prosecution and the judge, the judgment in criminal contempt based on such unlawful and irrelevant considerations was void and deprived petitioner of her liberty without due process of law..... 33

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IN THE
Supreme Court of the United States

October Term, 1955

No.

OLETA O'CONNOR YATES,

Petitioner,

vs.

UNITED STATES OF AMERICA.

**Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit.**

*To the Chief Justice of the United States and the Asso-
ciate Justices of the Supreme Court of the United
States:*

Oleta O'Connor Yates respectfully petitions that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit which affirmed an "order, judgment and certificate of criminal contempt" made by a trial judge in the District Court for the Southern District of California, Central Division, adjudging petitioner guilty of eleven separate criminal contempts.

Opinions Below.

The opinion of the Court of Appeals (App. A) is not yet reported. No written opinion was rendered by the trial judge in this particular proceeding.¹

Jurisdiction.

The judgment of the Court below (App. B) is dated, and was entered, on July 26, 1955. A petition for rehearing was duly filed, and denied, on November 2, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

Questions Presented.

1. Whether refusal on the same grounds to answer a series of questions on the same subject and of the same character in the same trial may be treated as separate contempts and separately punishable, in the light of the provisions of 18 U. S. C., Section 401, the Congressional purpose in the enactment of the said statute, the double jeopardy provisions and the due process provisions of the Fifth Amendment.

2. Whether the decision and judgment of the Court below holding that the trial judge was empowered to impose a punitive punishment of imprisonment for one year

¹There were four related judgments and orders entered by the trial judge against this petitioner in different contempt proceedings arising solely out of petitioner's refusal to answer certain questions during her cross-examination in the Los Angeles Smith Act trial, *United States v. Yates, et al.* Determination of the legal issues here requires a consideration of these companion proceedings as well as an appraisal of the proceedings in the criminal trial, now on file in this Court after the grant of Certiorari on October 17, 1955. *Yates, et al. v. United States*, Nos. 308, 309, 310. These matters are detailed hereafter in the Statement of the Case.

in proceedings whose character and purpose were essentially coercive and remedial were contrary to law, the provisions of 18 U. S. C., Section 401, and deprived petitioner of her liberty without due process of law in violation of the due process provisions of the Fifth Amendment.

3. Whether the sentence of one year imprisonment imposed upon petitioner under the circumstances herein was contrary to law and policy in the administration of justice in summary contempt proceedings and so unnecessarily severe, grossly excessive and arbitrary as to constitute a manifest abuse of discretion, cruel and inhuman punishment and a deprivation of petitioner's liberty without due process of law in violation of the due process provisions of the Fifth Amendment and the provisions of the Eighth Amendment.

4. Whether the imposition of the sentence of one year imprisonment by the trial judge on the unlawful, irrelevant and extraneous grounds that petitioner after trial and discharge of the jury continued in her refusal to answer the inquiries propounded during her cross-examination for the benefit of the prosecution in some possible future trial, deprived petitioner of her liberty without due process of law contrary to the due process provisions of the Fifth Amendment, and voided the sentence and judgment of contempt.

Statutes and Rules Involved.

The pertinent provisions of 18 U. S. C., Section 401 and Rule 42 of the Federal Rules of Criminal Procedure are set forth in Appendix G hereof.

Statement of the Case.

A. The Criminal Trial—How the Contempt Proceedings Arose.

In order to focus the legal issues here, it is necessary to appraise initially the circumstances out of which the contempt proceedings arose.

On December 21, 1951, an indictment was returned against this petitioner and thirteen other defendants charging a conspiracy to violate certain provisions of the Smith Act (18 U. S. C., 371, 2385). Trial under this indictment commenced on or about February 1, 1952. The prosecution rested its affirmative case on May 21, 1952 [R. 8659].²

The evidence adduced by the prosecution in support of its affirmative case purported to establish that the principles of Marxism-Leninism were the equivalent of the advocacy of the forcible overthrow of the Government, that the Communist Party advocated and taught the aforesaid principles, and that the petitioner and her co-defendants were members and officers of the said Party.

Through documentary evidence and the oral testimony of numerous witnesses, the prosecution in its affirmative case placed before the jury its proof that petitioner and her co-defendants were members and officers of the Party during the period charged in the indictment. It is pertinent here to note that among the co-defendants were the following persons: Frank Spector, Al Richmond, Dorothy Healey, Ernest Fox and Albert Jason Lima.

²The reference "R." is to the Reporter's Transcript of Proceedings in the criminal trial on file in this Court, *Yates et al. v. United States*, Nos. 308, 309, 310.

The witnesses also testified during the prosecution's affirmative case that they had attended Party meetings and classes where they had heard certain statements made by other members and officials of the Party. Among such persons identified by the prosecution witnesses as members and officials of the Party were: Harry Glickson [R. 443-5]; Leon Kaplan [R. 4481, 5440-4]; Ida Rothstein [R. 4424-26]; Herschel Alexander [R. 7617-27]; and Celeste Strack [R. 5519-20].

At the conclusion of the prosecution's affirmative case, ten of the defendants rested their cause. Among these ten, were the five defendants aforementioned [R. 10,074-77]. Petitioner and three other defendants, did not rest. Petitioner took the stand and testified in her own defense.

The petitioner in her direct testimony [R. 10,159-11,170] made no attempt to contradict in any way the identification by the prosecution witnesses of the aforesaid persons as members and officers of the Party.³ Petitioner limited her testimony to her own understanding of the principles and programs of the Party and the principles of Marxism-Leninism. Petitioner stated on her direct examination, during a discussion of the role of the State in Marxist theory, that she had witnessed or read of many acts of violence and terrorism against members of the Communist Party by vigilante groups and local police officials [R. 10469-80; Ex. JA, R. 10220-36; Ex. JT, R. 10453-80; Ex. LS, R. 10504-17; Exs. LU and LV, R. 10517-20], and that "in order to protect the lives,

³This portion of the prosecution's testimony went uncontradicted throughout the trial, and was not disputed in counsels' summations to the jury.

the families, the jobs and the welfare of these people there are many times and many people who cannot publicly announce their political affiliations however much they would like to do so" [R. 10,517].

Petitioner having concluded her direct examination was subjected to a lengthy cross-examination concerning her knowledge and understanding of the principles of Marxism-Leninism, to all of which she answered fully and at length [R. 11,228-740, 11,853-72]. During her cross-examination, petitioner was asked if she knew the aforementioned co-defendants who had rested and the third party declarants who had been identified as members and officers of the Communist Party as aforesaid. Whenever asked, petitioner acknowledged that she knew such persons and the length of time she had known them. She declined only to identify them as members of the Party, although she never denied that they were [R. 11310-15, 11619-33]. The Court instructed the jury at the conclusion of the trial, without objection, that "the fact that the defendant Yates refused to answer certain questions may be considered by the jury in determining the weight and credibility of her own testimony." 106 F. Supp. 906, 929. There was a verdict of guilt and judgment of conviction in the principal cause.

B. The First Contempt Proceeding.

No question of active misbehavior or even rudeness or discourtesy is involved herein. There was no physical obstruction of the trial proceedings. When the issue was first raised on the opening day of petitioner's cross-examination (June 26, 1952), she stated that her declination was based solely on her unwillingness to cause the individual "the loss of his job, his income and perhaps

be subjected to further harassment, and in a period of this character, where there is so much witch-hunting, so much anti-communism, I am sorry I cannot bring myself to contribute to that" [R. 11312]. Petitioner then stated: "However many times I am asked and in however many forms, to identify a person as a communist I can't bring myself to do it, because I know it means loss of job, I know that it means persecution for them and their families, I know that it even opens them up to possible illegal violence, and I will not be responsible for that. I will not do it" [R. 11315].

That these initial statements were expressions of conscience and so understood by the District Court is clear from the record. The trial judge stated: "The witness does not want to be an informer" [R. 11351]. "The jury undoubtedly understand what it is to be put under the obligation to inform on others. They may feel that they would do the same thing" [R. 11337].

The prosecution urged upon the trial judge a holding that petitioner was in contempt of court and requested a coercive order [R. 11346-47]. This was on the first day of cross-examination. The petitioner had been asked whether she knew Harry Glickson [R. 11310], who had been identified by prosecution witnesses as a member of the Party. Petitioner answered that she did know the said Glickson, and had known him since the early 30's [R. 11310]. She was then asked if she had known Glickson to be a member of the Party [R. 11,312]; upon declining to answer for the aforestated reasons, if it were not true that Glickson during the years 1945 and 1946 had been an active chairman of a communist club in San Francisco [R. 11,313]; and again, upon declining to answer for the same reasons, whether Glickson was in

1950 an active member of the Communist Party [R. 11,314]. Petitioner also declined to answer an inquiry which sought to elicit the same identification of the defendant Spector [R. 11,318-19]. As has been noted, the said defendant Spector had previously rested his case without denial of the testimony of prosecution witnesses who had identified him as a member and officer of the Party.

At the conclusion of the aforesaid first day of cross-examination, the trial judge held that in declining to answer the four questions as discussed above, petitioner had committed four separate offenses of contempt of court. Petitioner was immediately committed to the custody of the United States Marshal "to be by him imprisoned in a jail type institution until you have purged yourself of your contempt by answering the questions ordered to be answered in each instance or until further order of the Court" [R. 11,372-73]. On the next day, a formal judgment was entered by the trial judge entitled "Judgment, Order and Commitment of Civil Contempt" [R.-27, p. 3].⁴ Petitioner was thereafter confined in jail during the remainder of her cross-examination and until the termination of the trial, a period of about 43 days.

It will be helpful to this Court, it is respectfully submitted, to pursue these initial contempt proceedings to their conclusion. Petitioner was committed for her "civil contempt" on June 26, 1952. On August 6, 1952, the jury returned its verdict of guilt in the principal cause.

⁴In the Court of Appeals, the transcript of the record in this initial "civil contempt" proceeding was numbered 13527, and has been filed with this Court in order to facilitate the appraisal of the subsequent contempt proceedings arising out of the same subject matter. The reference to this transcript is "R.-27."

On August 7, 1952, sentence was imposed. Bail pending appeal from the judgment of conviction in the principal cause was denied by the trial court. The Court of Appeals remanded with directions to the District Court to fix the amount of bail. Upon remand, bail was again denied by the District Court. On August 29, 1952, the Court of Appeals itself fixed bail in the sum of \$20,000 pending appeal. On August 30, 1952, petitioner furnished the said bail before another Judge, then sitting temporarily in the District Court, but the United States Marshal advised the said Judge that he was holding petitioner pursuant to the judgment of civil contempt, and that he could not release petitioner without an order of the court. Petitioner was permitted to furnish the \$20,000 bail and ordered released upon her stipulation that she would appear before the trial judge on the question of the "civil contempt" [R.-27, p. 11].

On September 3, 1952, petitioner appeared before the trial judge. In the view of the trial judge, the Government was still "entitled to the benefit of the old answers . . . the purpose in civil contempt is to coerce the witness . . . the purpose is to get her testimony . . . the purpose of coercion is to compel the answer to the question . . . the Government is a litigant in the case, for whose benefit the coercive power of the court is exercised on the witness to compel the answers . . . the Court of Appeals may order a new trial . . . there are coercive powers to compel the witness to do what she should have done when she was on the witness stand . . . It isn't a punitive matter . . . as long as the proceedings are pending, and if there is any purpose to be gained by the testimony, by any litigant entitled to it, it seems to me that the power of the court continues . . ." [R.-27, pp. 29-41].

Petitioner was "ordered back into physical custody of U. S. Marshal pursuant to order of June 26, 1952, *re* civil contempt" [R.-27, p. 12].⁵ On September 4, 1952, petitioner surrendered to the Marshal and was returned to jail. This was about 30 days after the conclusion of the trial. Petitioner had previously been in custody about 65 days.

On September 5, 1952, the Court of Appeals stayed execution of the aforesaid order, and ordered petitioner's release on bail pending appeal from the said order [R.-27, pp. 47-8]. Petitioner was finally released on September 6, 1952, after furnishing the said bail.

The Court of Appeals reversed. The opinion is unreported (App. D).⁶ The Court held that the order directing petitioner's return to custody was improvidently granted because "it was error to attempt to coerce this witness into testifying before a jury which had been disbanded and could not be legally recalled" (App. D, p. 23). The Court expressed the view that "there is no essential dichotomy between 'civil' and 'criminal' contempt"; that "a fixed term or an indefinite one which might last longer seems to make no distinction of practical value to a prisoner"; that "even the unexpressed purpose of the judge to coerce or punish is no test"; that "if we become involved in the bog of signification of phrases, the clear way will be lost" (App. D, pp. 18-19). Judge Stephens concurred only in the result (App. D, p. 23).

⁵The District Court's written opinion appears in 107 F. Supp. 408 (App. C).

⁶All of the separate contempt proceedings were heard and determined by the Court of Appeals at the same time.

C. The Second Contempt Proceeding—Multiplication of Offenses.

After the petitioner had been imprisoned at the conclusion of the first day of her cross-examination (June 26, 1952) as aforesaid, her cross-examination continued thereafter uneventfully until about the third day of her cross-examination (June 30, 1952), when towards the conclusion of the day, the trial judge remarked: "She has been under cross-examination, this is the third day, Mr. Neukom, I expect you to be somewhere near the conclusion of it" [R. 11,616]. The cross-examination up to this point, since the events of the first day, had been directed to petitioner's knowledge and understanding of the principles of Marxism-Leninism, matters which she had brought out on direct. The day's session was coming to a close. The prosecutor anticipated "going the remainder of tomorrow" [R. 11,616]. The Court stated: "You are wasting time now" [R. 11,616]. Whereupon, the prosecutor brought the day's session to a close by a series of inquiries, asking the petitioner to identify Kaplan, Rothstein, Alexander, Richmond, Healey, Spector (name previously asked on the first day), Fox, Lima and Strack [R. 11,619-33]. As previously noted, all of these persons were co-defendants or third party declarants, identified by prosecution witnesses as members of the Party, a fact never put in issue by petitioner or any other defendant.

Petitioner admitted, whenever asked, that she knew these persons and testified as to the length of the time she knew them [R. 11,620, 11,621, 11,622, 11,633]. The petitioner stated however that she could not identify these persons as Communists. "I am sorry I can't for the same

reasons that I advanced last week" [R. 11,618]. "This is again the same question, and if you ask it in 20 different forms, if the content is the same, my answer must be the same" [R. 11,620].

At the conclusion of the day's session, and after the jury had been excused, the trial judge stated: "I expect to treat the contempt of the court committed by the defendant Yates in today's session as criminal contempt pursuant to Rule 42(a). That is my present inclination, and deal with them independently as far as punishment is concerned" [R. 11,634]. Upon request of counsel, immediate action was deferred [R. 11,634-35]. Subsequently, and on July 8, 1952, during the trial, the trial judge filed an "Order, Judgment and Certificate of Criminal Contempt" [R.-41, pp. 3-15].⁷ The order recites eleven specifications and includes only the refusals to answer on the third day of cross-examination (June 30, 1952).

As noted, on August 6, 1952, the jury returned its verdict of guilt in the principal cause and the jury was discharged. On August 7, 1952, sentence of five years imprisonment and fine of \$10,000 was imposed on petitioner. On August 8, 1952, petitioner was brought before the District Court for the purpose of determining what punishment should be imposed for failure to answer the eleven additional questions of June 30, 1952. Before imposing sentence the trial judge stated, among other things: "I had hoped by this time that Mrs. Yates might be willing to purge herself; that she might be prompted

⁷The Transcript of Record in this proceeding was numbered 13541 in the Court of Appeal, and is referred to here as "R.-41." This transcript is being filed in this Court together with this petition for writ of certiorari, the judgment in this proceeding being the one under review.

to do so" [R. 44, p. 27]. The judge stated that he "might treat answers now to the questions as a vindication of judicial authority and treat it [the contempt] as purged" [R. 41, p. 28]. "I take it from the defendant's statement that she is as adamant now as she was the day the questions were put" [R.-41, p. 28]. "Now, the Government was entitled on cross-examination to show, if they could, that that person whom Mrs. Yates impliedly said was a very foolish person^a was a friend of Mrs. Yates . . . We do not know. That is the problem, we do not know; . . ." [R.-41, p. 32]. "I hope Mrs. Yates will yet purge herself . . . If she at any time within 60 days, while I have the authority to modify this sentence under the Rules, wishes to purge herself, I will be inclined even at that late date to accept her submission to the authority of the Court" [R.-41, p. 37].

The sentence of the trial judge on August 8, 1952, was imprisonment for one year for "each of the eleven separate contempts" [R.-41, p. 17], the sentences on each count to run concurrently and to commence following petitioner's release from custody following execution of the five-year sentence of imprisonment [R.-41, pp. 17-18].

The Court of Appeals affirmed the judgment. The Court stated: "These eleven questions, each of which was propounded upon June 30, constitute incidents separate and distinct from the first four" (App. A, p. 2). "In this proceeding, there was no attempt at coercion to

^aMrs. Yates' testimony regarding the meaning of Marxism-Leninism had varied sharply from statements attributed to the third party declarant.

require the answers" (App. A, p. 3). "The sentence was severe. Its control is not in our province. It certainly indicates no abuse of discretion" (App. A, p. 8).

D. The Third Contempt Proceeding—Further Post-trial Coercion.

When petitioner was finally released on bail pending appeal on September 6, 1952, from the order directing her return to confinement for failing to answer the first four questions, she was again told by the then sitting judge that the trial judge desired her presence before him on September 8. Petitioner appeared before the trial judge on the said day, some thirty days after the conclusion of the trial. Petitioner learned for the first time that the trial judge proposed to punish her failure to answer the first four questions of June 26 as criminal contempts. The trial judge stated before imposing sentence: "The Court invoked equitable powers to attempt to force you to answer at that time, Mrs. Yates, but that has apparently been unsuccessful. Do you wish to answer the questions at this time? . . . You could end it very simply, Mrs. Yates, by answering the questions" [R.-35, p. 50].⁹

The sentence of the trial judge was imprisonment for three years "for your refusal to answer the four ques-

⁹The Transcript of Record in the Court of Appeals was numbered 13535, and is referred to here as "R.-35." The transcript has been filed with this Court in order to enable it to appraise the validity of the aforesaid one year "criminal contempt" judgment which was affirmed by the Court of Appeals.

tions concerning Harry Glickson and Frank Spector," the sentences to run concurrently [R.-35, p. 52]. The written opinion of the trial judge is reported in 107 F. Supp. 412 (App. E). Upon imposing sentence, the judge stated: "I may say, Mrs. Yates, before you leave the bar, that at any time during the period I have jurisdiction to do so, if you are disposed to purge yourself of this contempt and obey all lawful orders of the court, I will entertain a motion to modify any one, not only this sentence [three years], but any other of the sentences heretofore imposed in the other criminal contempt proceeding [one year] which is No. 22,379 on the records of this Court" [R.-35, p. 53]. To the protests of counsel, the judge replied that "in view of the indication the court has given, Mrs. Yates still has the keys to the jail in her own pocket" [R.-35, p. 55].

Petitioner was returned to custody on September 8.¹⁰ The Court of Appeals ordered her release on her own recognizance pending appeal. Petitioner was released on September 11. Thus, shuttling in and out of jail, peti-

¹⁰The trial judge appeared determined after trial to incarcerate the petitioner as a means of coercing her answers. Petitioner had been released on bail after trial pending her appeal from the judgment of conviction in the criminal trial; she had been released on bail pending appeal from the order directing, after trial, her return to custody on the civil contempt of June 26, 1952; the one year sentence of imprisonment for the alleged contempt of June 30, 1952, was to commence after the five year sentence on the Smith Act conviction had been served. Only after these events had transpired, when it appeared that the petitioner was still at liberty, did the trial judge impose a three year sentence of imprisonment for failure to answer the four questions propounded on the first day of cross-examination, June 26, 1952.

tioner had been confined pursuant to the three contempt orders in all about 70 days.

On November 12, 1952, the trial judge, having previously requested the Court of Appeals to remand the judgment for the said purpose, entered an "Order Supplementing 'Certificate, Order and Judgment on Contempt' *nunc pro tunc* as of September 8, 1952" [R.-35 pp. 63-4]. It was ordered that the provisions of the judgment be supplemented by the additional order that the 3 year term of imprisonment follow upon petitioner's release from custody following execution of the five year sentence, and run concurrently with the 1 year contempt sentence. It was further ordered "that if and when, at any time prior to the defendant's release from custody following execution of the concurrent three-year sentences of imprisonment herein imposed, the defendant shall purge herself of contempt by answering under oath the questions as provided in the 'Judgment, Order and Commitment in Civil Contempt' entered June 26, 1952, in proceeding No. 14291—Civil in this court, and shall be declared so purged by order of this court in said proceeding numbered 14291, then the four concurrent three-year terms of imprisonment herein imposed shall *ipso facto* cease and terminate" [R.-35, p. 60].

The Court of Appeals reversed. The written opinion is unreported (App. F). The Court stated: "This situation is complex. To overcome the refusal of the defendant in a criminal case to answer these four questions, the court had committed her. While upon the wit-

ness stand during this confinement, Mrs. Yates had refused to answer eleven other questions of a similar nature, and was thereupon sentenced to imprisonment for a year as a punishment. This conviction has been upheld. It was expressly decided there that the two occasions were separate and distinct and different corrective and punitive measures were within the competence of the court" (App. F, p. 31).

The Court of Appeals adopted only one of the many grounds for invalidating the three year summary contempt judgment. The Court held that "the notions inherent" in due process of law "will not permit, without prior positive notification, what otherwise might be viewed as the indefinite confinement of a defendant in a criminal case pending his submission as a witness to authority, and then, when imprisonment has had no effect, the punishment of the refusal of obedience by incarceration for a term of years" (App. F, p. 34). The Court noted: "Since proceedings in contempt are *sui generis*, here the whole course of action in the criminal trial and all subsequent proceedings must be apprised" (App. F, p. 34, note 5).

ARGUMENT.

A.

The Court of Appeals has rendered a decision in conflict with decisions of the Court of Appeals, and so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision.

I.

The Separate Judgment of Contempt Rendered Against Petitioner for Refusal to Answer Similar Questions for the Same Reasons Upon the Third Day of Cross-Examination Was Illegal and Void, Deprived Petitioner of Her Liberty Without Due Process of Law and Placed Petitioner Twice in Jeopardy for the Same Offense, All Contrary to Law and to the Due Process and Double Jeopardy Provisions of the Fifth Amendment.

The gist of the ruling of the court below upholding the contempt judgment here involved is the alleged separateness of the offenses of the first and third days of cross-examination. "Those eleven questions, each of which was propounded upon June 30, constitute incidents separate and distinct from the first four" (App. A, p. 2).

That the object and purpose of the eleven questions propounded on the third day of cross-examination were the same as those propounded on the first day is clear from the record [R.-27, pp. 3-7; R.-41, pp. 3-14]. That the questions were similar is conceded by the court below. "While upon the witness stand during this confinement,

Mrs. Yates had refused to answer eleven other questions *of a similar nature*, and was thereupon sentenced for a year as punishment" (App. F, p. 31) (emphasis supplied). That the "separateness" of the offenses was not bottomed upon the differences in individuals is also plain. On the initial day, the first three questions treated as separate contempts were all designed to obtain the identification as a Communist of one Harry Glickson [R.-27, pp. 3-6]. The fourth question treated as a contempt with respect to Frank Spector [R.-27, pp. 6-7] was similar in nature to the one propounded on the third day with respect to the same individual, and also treated as a separate contempt [R.-41, pp. 10-11]. Also, on the third day, the first three questions of the same import, concerned one person, Kaplan [R.-41, pp. 3-5], all treated as separate contempts. Moreover, it is conceded that the grounds for refusal to answer the particular questions were the same as those advanced initially by the petitioner on the first day of her cross-examination, when she stated she would answer no questions of that character (App. A, pp. 5-7).

The issue as thus presented to this Court is whether, in conformity with the requirements of the fundamental law, a court may continue to punish as separate contempts refusal by a witness to answer repeated questions involving the same subject matter, where the subsequent questions are of the same nature as those initially propounded and the grounds for refusal to answer the same as those initially advanced. If the views of the courts

below be adopted, it would be theoretically possible for an astute interrogator, by a suitable variation of his questions, to produce a result under which the alleged contemptuous witness might be imprisoned for the balance of her life, particularly if the sentences were made to run consecutively. As the Statement of the Case makes evident, this was precisely the direction in which the trial judge here was headed.

The determination of the issue must be made in the light of the Congressional purpose in the enactment of 18 U. S. C., Section 401. The court below appeared to be of the view that "the power of the court [to punish for contempt] is inherent and can only be removed when the court is abolished" (App. D, p. 18). It has been held, however, that Congress has the constitutional authority to curtail this "inherent" contempt power. *Nye v. United States*, 313 U. S. 33; *In re Michael*, 326 U. S. 224; Frankfurter & Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts*, 37 Harv. L. Rev. 1010 (1924). The grant of this drastic power is to be grudgingly construed. The power is to be used sparingly. *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 451; *Anderson v. Dunn*, 6 Wheat. (U. S.) 204, 231. A rule of law which would open the door to widespread abuses of the contempt power similar to those which led to so much public clamor and condemnation of judges in the past would appear to be contrary to the plain legislative purpose in the enactment of 18 U. S. C., Section 401.

The decision of the court below, sanctioning the multiplication of offenses, is in direct conflict with the decisions of Courts of Appeals in other circuits on the same matters.

United States v. Orman, 207 F. 2d 148, 160 (C. A. 3, 1953); *United States v. Castello*, 198 F. 2d 200, 204 (C. A. 2, 1952). The decision is also in conflict with the decisions of lower federal courts which have passed on the same issues. *United States v. Emspak*, 95 F. Supp. 1012, 1014 (D. C. D. C., 1951); *United States v. Yukio Abe*, 95 F. Supp. 991, 992 (D. C. Haw., 1950). The decisions of the state courts are also to the contrary on the same question. *Fawick Airflex Co. v. United Electrical, R. & M. Wk'rs.*, 92 N. E. 2d 431, 436 (Ohio App., 1950); *People v. Amarante*, 104 N. Y. S. 2d 807 (N. Y. App. Div., 2d Dept., 1951), 100 N. Y. S. 2d 677, 681 (N. Y. Sup. Ct., Sp. Term, 1950), 100 N. Y. S. 2d 463 (N. Y. Sup. Ct., Sp. Term, 1950); *Maxwell v. Rives*, 11 Nev. 213, 221 (1876). See also *Note*, 29 Chicago-Kent L. Rev. 348-51 (1951).¹¹

No such theory of the power to punish for contempt as was advanced by the courts below can be accepted, it is respectfully submitted, in the light of express constitutional inhibitions and the historical events which led to the enactment of 18 U. S. C. 401 by Congress. When the petitioner on the first day of her cross-examination made her position clear, the prosecution could not multiply the contempts, and the court the punishments, by continuing to ask petitioner questions each time eliciting the

¹¹The rationale of these decisions finds support in other contempt cases where similar issues were involved. *United States v. Universal C. I. T. Credit Corp.*, 344 U. S. 218; *Lawson and Trenbo v. United States*, 176 F. 2d 49, 51 (C. A. D. C., 1949); *McGovern v. United States*, 280 Fed. 73 (C. A. 7, 1922); *State ex rel. Parker v. Mouser*, 208 La. 1093, 1104, 24 So. 2d 151, 155 (1945); *Gautreaux v. Gautreaux*, 220 La. 564, 574, 57 So. 2d 188, 191 (1952); *State ex rel. Schoenhausen v. King*, 47 La. Ann. 701, 17 So. 288 (1895).

same answer: her refusal to identify persons as members of the Communist Party. The refusal was total on June 26 when petitioner stated that she would not identify persons as members of the Communist Party no matter how many times she was asked, and the refusals to answer eleven similar questions for the same reasons on the third day of her cross-examination could not be considered as anything more than expressions of her intention to adhere to her earlier statements and as such were not separately punishable.

In short, there was not more than one contempt committed by petitioner; the contempt occurred, if at all, on June 26, 1952, the first day of cross-examination; the imposition of punishment for the offense exhausted the sentencing power of the court; the refusal to answer similar questions on the same grounds on the identical subject matter on the third day of cross-examination did not constitute a contempt of court separately punishable; and the trial judge was without power or jurisdiction to impose a sentence of one year imprisonment for such alleged "separate" offense.

This Court should review, it is respectfully submitted, the important constitutional and legal questions here presented. The extent of the power of lower federal courts to impose punishment for contempt is peculiarly within the province of this Court to determine. Since "judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence" (*McNabb v. United States*, 318 U. S. 332, 340), the importance of granting certiorari herein seems manifest, it is submitted.

B.

The Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court.

II.

Assuming Arguendo That the Refusal to Answer Similar Questions on June 30 Constituted Separate Contempts, the Trial Judge Was Without Power to Impose Punitive Punishment in Proceedings Essentially Civil in Character and Purpose.

This Court has uniformly held that where it is evident that the dominant purpose of the contempt proceedings is to coerce the contemnor to perform an act principally for the benefit of a party litigant, the proceedings are in civil contempt and punitive punishment may not be imposed. *Penfield Co. v. Sec. & Ex. Comm'n*, 330 U. S. 585; *Maggio v. Zeitz*, 333 U. S. 36; *Lamb v. Cramer*, 285 U. S. 217; *Gompers v. Buck's Store & Range Co.*, 221 U. S. 417; *Doyle v. London Guar. & Acc. Co.*, 204 U. S. 599; *Bessette v. W. B. Conkey Co.*, 194 U. S. 324; *Hendryx v. Fitzpatrick*, 19 Fed. 810, 812 (C. C. D. Mass., 1884).

The Court of Appeals stated in one of the companion proceedings here: "Even the unexpressed purpose of the judge to coerce or punish is no test" (App. D, p. 18). Whatever validity such statement of legal principle may have in the abstract, it is inapposite here. Here the purpose of the trial judge to coerce the answers was made manifest throughout all the various contempt proceedings during and after the criminal trial. In all the post-trial proceedings,—in the proceedings when the petitioner was ordered returned to jail under the judgment of civil con-

tempt [R.-27, pp. 21-45]; in the proceedings when the petitioner was sentenced to imprisonment for one year [R.-41, pp. 22-37]; in the proceedings when the petitioner was sentenced to three years [R.-35, pp. 21-57]—the trial judge constantly emphasized that the petitioner could purge herself of all contempts if she would only answer the questions, if she would only give the desired information to the Government, the plaintiff-litigant, or to the court.

It may be that the Court of Appeals confused the express purpose of the trial judge to coerce petitioner's answers to the questions with the lack of clarity in the motivations which prompted such coercive attempts after the trial had been concluded. On the one hand the trial judge appeared determined after trial to coerce the answers, as the record reveals, in order to overcome the expressed conscientious scruples of the petitioner as a test of her sincerity, and on the other hand to coerce the answers for the benefit of the plaintiff in the event a new trial was ordered in the principal cause. Almost thirty days after the trial had been concluded, the trial judge stated in a written opinion: "Thus it is clear that the answers now sought to be coerced from the defendant Yates *qua* witness have undeterminable potential value to the plaintiff in the criminal case now pending on appeal. And it is equally clear that this potential value—as yet withheld because of the contumacious conduct of the witness—will continue to exist so long as the criminal case of the United States against Yates continues in the status of pending litigation."¹² (App. C, p. 15.)

¹²If this premise had been accepted, the petitioner would have been in jail since September 4, 1952, and still confined.

What ever the motivations, it is clear from the record that the punishment imposed on the petitioner was intended to be remedial by coercing the petitioner to do what she had refused to do. The form and incidental effect of the proceedings may have been a vindication of the judge's authority, but the dominant purpose of all the proceedings was to coerce the answers for the benefit of prosecution and court. Under all the tests laid down by this Court in *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 417, the proceedings could only be denominated civil contempt proceedings. As such, the imposition of punitive punishment was "fundamentally erroneous." *Gompers v. Buck's Stove & Range Co.*, *supra*, p. 449.

Since the trial judge was without jurisdiction to enter the judgment of criminal contempt here involved, the affirmance of the judgment by the Court of Appeals deprives petitioner of her liberty without due process of law and should be reviewed by this Court. The strictly limited power to punish for contempt under 18 U. S. C., Section 401 may become unfettered if a trial judge who has lost the power to coerce the answers of a witness after the conclusion of a trial may revive his power thereafter in order to continue his attempt to coerce the answers by placing the gloss of a criminal contempt judgment over the post-trial proceedings or using language characteristic of criminal contempt. ". . . indirect consequences will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character, or *vice versa*." *Gompers v. Buck's Stove & Range Co.*, *supra*, p. 443.

C.

The decision and judgment of the Court of Appeals affirming the grossly excessive sentence of imprisonment upon petitioner for contempt of court has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision.

III.

The Sentence of One Year Imprisonment for Contempt Under the Circumstances Here Was so Harsh, Grossly Excessive and Arbitrary as to Constitute a Manifest Abuse of Discretion, Cruel and Unusual Punishment and a Deprivation of Petitioner's Liberty Without Due Process of Law in Violation of the Due Process Provisions of the Fifth Amendment and the Provisions of the Eighth Amendment.

There is no dispute that the sentence of one year here imposed for contempt of court was severe. So much is conceded by the court below (App. A, p. 8). The sole issue is whether this severe sentence was not so grossly excessive and arbitrary as to offend standards prescribed by the Constitution and the laws of the United States, as well as standards prescribed by a civilized society and legal precedents. That this Court has the power to afford relief when courts by excessive sentences exceed the bounds of power in contempt proceedings is established. *United States v. United Mine Workers of America*, 330 U. S. 258, 304; *Sacher v. Association of the Bar of the City of New York*, 347 U. S. 388. This Court noted in *Weems v. United States*, 217 U. S. 349, that the "cruel and unusual" punishment provisions of the Eighth Amend-

ment may be applicable to punishment which by its excessive length or severity may be greatly disproportionate to the offense charged (pp. 368-74).

In the determination of whether there has been an abuse of legal discretion and an infringement of constitutional principles in the case herein, this Court will undoubtedly weigh the circumstances involved in the particular proceeding, the nature and extent of the court's power in such proceeding, the standards of punishment set by legislatures and courts in proceedings and circumstances similar to the one involved herein, and the effect of the action taken by the courts below upon the fundamental rights of persons as well as the administration of justice. It is in this context, that petitioner presents to this Court the following considerations:

(a) The power of a district court to impose punishment for contempt of court of its authority is defined and limited by 18 U. S. C., Section 401. The history of the legislative enactment and the plain Congressional purpose indicates that the contempt power is to be narrowly construed, so that the instances where there is no right to a jury trial will be restricted to "bedrock cases." *Farese v. United States*, 209 F. 2d 312, 315 (C. A. 1, 1954). See, *In re Oliver*, 333 U. S. 257, 274; *In re Michael*, 326 U. S. 224, 227. Both Congress and the courts are limited in contempt cases to the use of "the least possible power adequate to the end proposed." See the prior discussion in this petition, p. 20.

(b) This Court has held that not every refusal of a witness to answer a question at a trial necessarily evokes the exercise of the contempt power. "An obstruction to the performance of judicial duty resulting from an act

done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted." *Ex parte Hudgings*, 249 U. S. 378, 383. Such clarity of proof is lacking in the case herein. As was pointed out in the Statement of the Case (pp. 4-6), the witnesses for the prosecution had identified the defendants and the third party declarants as members and officers of the Party. The petitioner on her limited direct examination never denied this evidence, and so the jury were not only free to find the fact of membership from the failure to deny, but were specifically instructed that they could draw the inference from the refusal of petitioner to answer. The cross-examination of petitioner extended for days and the prosecution was unable to claim any injury to its cause. The prosecution summed up to the jury upon the basis of an uncontradicted record. Counsel for all defendants including petitioner made no attempt to controvert the evidence concerning the Party membership of the individuals about whom the prosecution inquired. There was no interruption of the trial. A verdict of guilt was returned against all defendants. On this record, the only one injured by the failure to answer was petitioner herself.¹³

¹³In *United States v. Gates*, 176 F. 2d 78 (C. A. 2, 1949), defendant while on the stand introduced an exhibit into evidence in his own behalf, but declined to state who the three persons were who prepared the exhibit under his direction. The prosecution successfully maintained that the names of the persons were relevant to the inquiry for impeachment purposes. The case here was entirely different: the prosecution had itself established by evidence the Party membership of the persons involved, the petitioner did

(c) Moreover, there was no insolence or disrespect to the Court, no baseless refusal to answer. Petitioner stated initially to the trial judge that there was no intent on her part to show any disrespect for the court or for the rulings of the court or for the power or the authority of the court. "I stated what I did state because in all conscience I cannot do otherwise . . ." [R. 80, p. 11367]. The trial judge conceded that this was the only reason the petitioner declined to answer [R. 11337]. "Anyone can have an appreciation of the sportsmanlike spirit that might permit a person not to wish to be an informer" [R.-41, p. 27]. Other citizens of repute have noted the odium which attaches to the charge of "informer." *Chafee, Thirty-Five Years With Freedom of Speech* (Roger N. Baldwin Civil Liberties Foundation, 1952); *Colyer v. Skeffington*, 265 Fed. 17, 69 (D. C. Mass., 1920).

To support the harsh sentence, the Court of Appeals stated: "It is far from our thought that a trial court cannot maintain its essential authority where the deliberate defiance arises from loyalty to political confederates or the religion of communistic determinism" (App. A, p. 7). But the record does not support such inferences of abstract facts. *Cf. Stack v. Boyle*, 342 U. S. 1, 5-6. The petitioner did admit that she knew the persons named and the length of time she knew them. The petitioner

acknowledge she knew such persons and how long she knew them, and was ready to answer all related questions of a similar nature. In this case, the prosecution was able to go to the jury with its evidence on the issue undenied. In the *Gates* case, without the answers of defendant, the prosecution could at least argue, if the matter was at all relevant, that its impeachment proof had been blocked. It should be noted that the punishment in the *Gates* case was 30 days in civil contempt (p. 79).

also stated: "I am quite prepared to discuss anything that I did, anything that I said" [R. 80, p. 11234]. The exercise of freedom of conscience, where injury to the State is not clearly established, has always been safeguarded by this Court. *Girouard v. United States*, 328 U. S. 61; *Cantwell v. Connecticut*, 310 U. S. 296; *United States v. Ballard*, 322 U. S. 78; *West Va. State Bd. of Ed. v. Barnette*, 319 U. S. 624.

(d) Federal legislation and decisions in the federal jurisdiction emphasize that the amount of punishment to be imposed for contempt of court must be determined with great care and deliberation, in order that no injustice may be done and the restrictive policy of the law maintained. The punishment imposed must be reasonably commensurate with the gravity of the offense. While contempts in the presence of the court are not governed by statutory limitations, still the exercise of a sound legal, non-arbitrary discretion requires recognition of the fact that the most serious contempts of court not in its presence are punishable only by a maximum prison sentence of six months. 18 U. S. C., Section 402. The section "ought to have great weight in punishing criminal contempts under section 385 of 28 U. S. C. A. [now 18 U. S. C. 401]." *Ryals v. United States*, 69 F. 2d 946, 948 (C. A. 5, 1934).

That the sentence here is unwarranted, grossly excessive and arbitrary is made plain by the actions of other federal courts under circumstances far more serious to the administration of justice than in the case herein. The chart annexed hereto indicates the marked disparity in the extent of punishment between those cases and the one herein (App. H).

Even in Smith Act prosecutions, other courts have recognized the limitations on the drastic power to punish for contempt and the possible effect which severe penalties may have on the rights of an accused to testify in his own behalf. Thus, in the *Dennis* trial, Judge Medina imposed only a sentence of 30 days in civil contempt upon a defendant who failed to answer questions. *United States v. Gates*, 176 F. 2d 78 (C. A. 2, 1949). The case here presents a far less aggravated situation than in *Gates*. Judge Chesnut imposed a similar thirty-day sentence in the Baltimore trial [R.-41, p. 36]. Even after the trial judge acted in this case, Judge Dimock in the second New York trial imposed only a sentence similar to the one imposed by Judge Medina (N. Y. Times, Nov. 20, 1952).

Moreover, unlike other Smith Act cases, this petitioner has already spent 70 days in jail for the alleged contempt here, and this under cruel and oppressive circumstances (see Statement of the Case).¹⁴ Yet she has been subjected to another sentence of 1 year imprisonment, a sentence which exceeds by astronomical percentages the penalties imposed by federal courts in summary contempt proceedings.

(e) In the state jurisdictions, where the dangers of the abuse of the contempt power have also been noted, statutory limitation and the imposition of lighter penalties for similar offenses are the rule. In all of the 48 states and the District of Columbia, there are only three states

¹⁴Petitioner also spent more than four months in jail prior to the commencement of the trial because of the denial of bail by the same trial judge and the failure of the trial judge to abide by the decisions of this Court. See Note, 96 L. Ed. 14, 16-17.

—New Hampshire, Rhode Island and Vermont—which set no maximum whatever for contempt punishment. Twenty-nine jurisdictions impose an overall limitation on punishment by all courts for every kind of contempt. Only 9 of these states have a maximum term of imprisonment of six months. One of these 29 jurisdictions has a maximum of three months. All the rest of the 29 states have a maximum of 30 days or less. Two of the states have no provision for imprisonment.¹⁵

From all of the above, it appears clear that a rule of reason and practice has been established in this country which should govern courts in imposing penalties for contempt. Under all the circumstances here, the courts below exercised an arbitrary power in imposing a sentence of 1 year imprisonment upon this petitioner. The authority to restrain the exercise of such arbitrary power rests with this Court and justice requires that the authority be exercised here, for “justice must satisfy the appearance of justice.” *Offutt v. United States*, 348 U. S. 11, 14.

¹⁵Ariz. Code Ann., Par. 27-603; Conn. Gen. Stats., Sec. 7702; Dist. Col. Code, Tit. 11, Secs. 740, 756c, 774b and 933; Iowa Code Ann., Sec. 665.4; Minn. Stats. Ann., Par. 588.10; N. Y. Judiciary Law, Secs. 773 and 774; Ore. Comp. Laws Ann., Sec. 11-502; Rev. Codes of Wash., Sec. 7.20.020; Wisc. Stats., Secs. 295.14 and 295.16; Ind. Stats., Sec. 3-906; Mich. Comp. Laws, Par. 605.21; Miss. Code Ann., Par. 1656; Gen. Stats. of N. Car., Chap. 5, Sec. 4; N. Dak. Rev. Code, Tit. 27, Chap. 10; Utah Code, Tit. 10, Sec. 45-10; Nev. Comp. Laws, Sec. 8950; Ga. Code Ann., Tit. 24, Par. 2615; Code of Ala., Tit. 13, Par. 9; Ark. Stats. Ann., Tit. 34, Par. 902; Ohio Gen. Code, Sec. 12142; Tenn. Code, Sec. 10120; Code of Va., Par. 18-256; Idaho Code, Tit. 7, Par. 610; Rev. Codes of Mont., Tit. 93, Sec. 9810; Ky. Rev. Stats., Par. 432.260; Code of Laws of S. Car., Secs. 283 and 339; W. Va. Code, Sec. 360.

D.

The decision of the Court of Appeals upholding the imposition of the sentence herein upon unlawful, irrelevant and extraneous grounds is in conflict with the decisions of this Court and other Courts of Appeal on the same matters.

IV.

Since the Sentence of the Trial Judge Was Predicated Essentially Upon the Refusal of Petitioner to Answer the Questions After the Conclusion of the Trial for the Continued Benefit of the Prosecution and the Judge, the Judgment in Criminal Contempt Based on Such Unlawful and Irrelevant Considerations Was Void and Deprived Petitioner of Her Liberty Without Due Process of Law.

In *In re Gompers*, 40 App. D. C. 293, the Court in reducing the sentence in criminal contempt to 30 days for one defendant and fines of \$500 each for the other two defendants, stated: "While the injunction was issued to restrain the most subtle and far-reaching conspiracy to boycott that has come to our attention, the boycott had ceased and the necessity for the injunction no longer existed at the time this case was tried below. A penalty, therefore, which would have been justifiable to prevent further defiance of the order of the court but for the settlement, would now be needless and excessive" (p. 336).

As the Statement of the Case indicates, the principal reason for the imposition of the sentence here was the view of the trial judge that the answers of the petitioner would "have undeterminable potential value to the plaintiff in the criminal case now pending on appeal" (App.

C, p. 15). The emphasis throughout all the post-trial contempt proceedings was on the withholding of "this potential value." The trial judge stated that if petitioner would "purge" herself, and answer all questions, the court would modify all the sentences it had imposed. "Mrs. Yates still has the keys to the jail in her own pocket" [R.-35, pp. 53-5]. As a matter of law, however, neither the trial judge nor the prosecution had any further interest in or right to obtain the answers propounded to petitioner on cross-examination during the trial which had previously been concluded. *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418; *Parker v. United States*, 126 F. 2d 370 (C. A. 1, 1942); *Loubriel v. United States*, 9 F. 2d 807, 809 (C. A. 2, 1925), to cite only a few of the many applicable decisions on this point. Indeed, the Court below so held (App. D).

Where there are neither parties nor subject matter before the court, there is no longer a case in which questions can be asked. The petitioner was under no further duty to testify after the jury was discharged, and she could no longer be compelled to discharge a duty which had ended. Yet it was precisely because of her failure to do that which she could no longer do nor be compelled to do that petitioner was sentenced to a term of one year imprisonment. There is nothing in the record here which would support the position that petitioner was given this harsh and grossly excessive sentence for obstructing the administration of justice. The dominant consideration in the imposition of the punishment by the trial judge was the "potential value" of the answers to the questions—"as yet withheld because of the contumacious conduct of the witness" (App. C, p. 15).

The consideration of unlawful, irrelevant and extraneous factors in the imposition of punishment for contempt violates essential principles of due process and voids the judgment of contempt. *Oates v. United States*, 223 Fed. 1013 (C. A. 4, 1915); *Gridley v. United States*, 44 F. 2d 716, 743 (C. A. 6, 1930); *Wilborn v. State*, 156 Tex. Cr. 483, 243 S. W. 2d 839 (1952). See also, *Vetterli v. United States*, 344 U. S. 872; *Yasui v. United States*, 320 U. S. 115.

Conclusion.

The petition for writ of certiorari should be granted, the writ issued, and the judgment of contempt herein reversed.

Respectfully submitted,

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By BEN MARGOLIS,

Attorneys for Petitioner.

APPENDIX A.

United States Court of Appeals for the Ninth Circuit.

Oleta O'Connor Yates, Appellant, vs. United States of America, Appellee. No. 13,541. July 26, 1955.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Stephens, Fee and Chambers, Circuit Judges
James Alger Fee, Circuit Judge:

On July 8, 1952, an order, judgment and certificate of criminal contempt was entered as to Oleta O'Connor Yates upon eleven specifications of refusal to respond to questions put to her on cross-examination after a direction by the court while she was a witness in the trial of the case entitled on the records of that court United States vs. Schneiderman, *et al.*, No. 22131-C.D. This certificate recited these refusals "were committed in the actual presence of the Court and were seen or heard by the Court."

After the sentence of five years in the principal case was imposed upon Mrs. Yates on August 7, 1952, in the main case in which she was a defendant (Yates vs. United States, F. 2d), she was in custody thereunder, together with the other convicted defendants. The court held a hearing on August 8, 1952, at which she was present, personally, and was represented by counsel. Based upon the "order, judgment and certificate of criminal contempt" of July 8 under 18 U. S. C. A. §401, hereinabove referred to, the court adjudged Mrs. Yates had been convicted of eleven separate criminal contempts therein set out. The defendant was thereupon committed to the custody of the Attorney General of the United States for one year for each of such contempts. These sentences were made to run concurrently with each other,

but all were made to take effect upon the release of defendant from custody following execution of the five year sentence of imprisonment imposed August 7, 1952, upon this defendant in Case No. 22,131, United States vs. Schneiderman.

Appeal was taken from this judgment of criminal contempt on August 13, 1952.

The proceedings of the court were fair and in accordance with the precedents. There was due process at every stage. When the matter came on for hearing the day after sentence in the main case, the court had power to impose appropriate sentence for the contempts specified in the order of July 8.

There was a lapse of time between the commission of the disobedience of the order in open court and the entry of the judgment establishing each refusal as a criminal contempt on July 8 and the entry of sentence on each of the contempts on August 8. It is now well established practice for the trial judge to reserve punishment of contempts by participants in a criminal trial. The dangers surrounding such procedure are not legal in nature, but arise in policy. None was apparent here.

A point was made in the trial court that, since defendant was in custody after June 26, when she was committed, until she had given answer to four questions which were propounded to her upon that date, the time so spent should have been applied in mitigation of this punitive sentence. But that measure applied only to the four questions, as noted above, propounded on that date. These eleven questions, each of which was propounded upon June 30, constitute incidents separate and distinct from the first four. Furthermore, verdicts of guilty were

returned in the main case against Mrs. Yates and the other defendants on August 6, and she was held in jail on that charge pending sentence. The custody on the first contempt charge ended with the discharge of the jury. Neither the coercive custody on the first contempt charge nor yet confinement after verdict upon the main charge was relevant to the criminal sentences here.

The main contention of defendant is that, when this punitive sentence was imposed, it was no longer possible for defendant to purge herself because the trial had ended and that it is improper for the court to use criminal contempt as a coercive rather than a punitive proceeding.

While it is true the court did speak of his disposition to release the defendant from the adjudication of contempt on these specifications in the event she bowed to the authority of the court, this was a suggestion of grace. It must be clearly recognized that it was no longer possible for the situation to be restored so that she could testify. In another proceeding as to other contempts, the trial judge indicated his opinion that he had power to imprison defendant until the questions there were answered. In this proceeding, there was no attempt at coercion to require the answers.

The persistent and recalcitrant refusal to bow to the authority of the august tribunal, even when offered grace after the trial was over, is highly illuminating.

The next contention of defendant takes color therefrom. Defendant, notwithstanding her defiance of the orders of the court and her refusal of grace, insists that the sentence of one year is excessive and arbitrary, constitutes cruel and unusual punishment and is a denial of due process of law in violation of the Eighth and Fifth Amendments to the federal Constitution.

The defendant had been committed for coercive purposes on June 26 to compel her answers to certain questions. Four days later, while still in custody and still under cross-examination, she committed the contempts certified in this case by refusal to answer other questions. The trial judge found from her own statement in open court on the day of sentence that "she is as adamant now as she was the day the questions were put."

The processes of justice require that all witnesses in a criminal case should obey the legal orders of the court. These processes cannot function without evidence adduced by legitimate questions and answers thereto.

In our system, there is an impregnable bastion erected to protect a defendant not only against self incrimination, but even against a compulsion to testify. As long as a defendant remains within the barbican of this guarantee, protection is absolute. The prosecutor cannot comment on this silence.

All the defendants in this case except Mrs. Yates accepted this protection. She voluntarily waived it. She knew the rule. She knew if she testified in order to attempt to clear herself and the other defendants, that she would be asked if they belonged to the Communist Party.

The various suggestions now made that the questions were not material, that the failure to answer did no harm, that she and the other defendants were convicted in any event are creations of straw. Technically, the questions were proper and material.

Her own alleged reasons are of no more validity. She said:

"Well, I am quite prepared to discuss anything that I did, anything that I said, but I am not willing to provide names and identities of people other than those that I have indicated, because I believe that in the case of the other defendants their case is already rested and I would only be contributing toward adding to the prosecution case against them, and I think that that would be becoming a government informer and I cannot do that.

"* * *

"The Court: You are instructed, Madam, to answer that question.

"The Witness: I understand, your Honor. And for the reasons I have given, because I just will not be an informer, I will not play the role of a witness for the Government, and I will not add to the prosecution's case against people who have rested, who are defendants and who are putting on no further defense. I am sorry, your Honor, I cannot answer that question.

"The Court: You understand the possible consequences of your refusal to answer, I take it?

"The Witness: I am afraid I do, but the possible consequences, grim as they may be, are not as bad as going around hanging your head in shame for the rest of your life, because you will not be an informer.

"* * *

"The Witness: Well that is a question which, if I were to answer, could only lead to a situation in which a person could be caused to suffer the loss of his job, his income and perhaps be subjected to further harassment,

and in a period of this character, where there is so much witch-hunting, so much hysteria, so much anti-communism, I am sorry I cannot bring myself to contribute to that.

“* * *

“However many times I am asked and in however many forms, to identify a person as a communist, I can't bring myself to do it, because I know it means loss of job, I know that it means persecution for them and their families, I know that it even opens them up to possible illegal violence, and I will not be responsible for that. I will not do it.

“* * *

“As I stated this morning, I would again be putting myself in the role of a government informer if I were to start discussing any of the questions that pertain to defendants who have rested their case, and do not propose to put on any further defense, and for that reason I refuse to answer.

“* * *

“A. No. I am sorry I can't for the same reasons that I advanced last week. I feel that these people are in a position where my identification of them as Communists would do them an inestimable amount of damage. I am willing to give names of people whom I know I cannot hurt, but where it is a question of damaging their interests, of harming their ability to make a livelihood, of hurting their families, No.

“Q. People that are employed by the Communist Party would not be discharged, would they, by having their names revealed?

“A. People who may be employed by the Communist Party would not be discharged by having their names re-

vealed, but members of their families can suffer the results of it in many different ways.

“* * *

“Well, that, again, comes into the same category. I can be asked 500 names, and if my identification of these people who are living people who can be hurt by my public identification of them, as they can be, then I cannot answer it. I am willing to name people who may have died, whose families cannot be * * *.”

It must be remembered she was being asked about persons with whom she was charged as a co-conspirator in agreement to teach and advocate the overthrow and destruction of the government of the United States by force and violence as speedily as circumstances would permit. A defendant who chooses to take the stand cannot pick and choose the questions to which he will give answer. A person accused of murder jointly with another who is alleged to have actually done the killing cannot refuse to answer as to association or acts of the latter on the ground that he would hang his head in shame if he testified for the government against a person he thought unjustly accused. The guarantee against being required to testify would be turned into a sword instead of a shield.

The court had a right to take into consideration the defiant and recalcitrant attitude of defendant in assessing the penalty. A defendant in an ordinary criminal case who attempted so to protect his confederates would be dealt with severely, and necessarily so. It is far from our thought that a trial court cannot maintain its essential authority where the deliberate defiance arises from loyalty

to political confederates or the religion of communistic determinism.

The sentence was severe. Its control is not in our province. It certainly indicates no abuse of discretion. It is true the vindication of the authority of the court would have been better subserved by an immediate commitment rather than confinement after release on the sentence in the main case. This Court has no power to control the discretion of the trial judge in this respect either.¹

Affirmed.

(Endorsed:) Opinion. Filed July 26, 1955.

Paul P. O'Brien, Clerk.

¹United States vs. Bollenbach, 2 Cir., 125 F. 2d 458, 459.

APPENDIX B.

United States Court of Appeals for the Ninth Circuit.

Oleta O'Connor Yates, Appellant, vs. United States of America, Appellee. No. 13,541.

Judgment.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment.

Filed and Entered: July 26, 1955.

Paul P. O'Brien, Clerk.

APPENDIX C.

United States v. Yates. Civ. No. 14291. United States District Court, S. D. California, C. D. Sept. 3, 1952.

Mathes, District Judge.

While on trial under an indictment charging conspiracy, 18 U. S. C., §371, to violate the Smith Act, 54 Stat. 670, 1940, 18 U. S. C. 1946 ed., §10; *id.* 1948 ed., §2385, defendant Oleta O'Connor Yates chose to take the witness stand in her own defense. Upon cross-examination she declined to answer certain questions, and repeatedly persisted in her refusal after being instructed by the court to answer.

The criminal trial was interrupted and a hearing had. 85 Tr. 11325-11354, 11367-11477. Upon this hearing counsel for the defense conceded that the questions which the defendant as witness blatantly refused to answer were properly put to her, and that "unquestionably this is exclusively within the court's sound discretion." See United States v. Toner, 3 Cir., 1949, 173 F. 2d 140, 144; Fed. Rules Crim. Proc. 52(a), 18 U. S. C.

By way of justification, to paraphrase the language of United States v. Gates, 2 Cir., 1949, 176 F. 2d 78, 80, the defendant vigorously urged that the court should establish a rule of public policy to protect her from the embarrassment of disclosing the identity of certain of her associates, and to protect them from fear of economic reprisals so that activities claimed to be of a political nature might be carried on in secret.

The defendant also attempted to justify her refusal upon the claimed moral dictum that a witness should not be compelled to be an "informer" or a "stool pigeon"; that a witness should be permitted in effect to testify as the

witness might choose on direct examination, and then be permitted to decline answers on cross-examination upon the ground that the information called for was gained in confidence from friends or others and to compel disclosure would be unsportsmanlike.

Being of the opinion expressed in *United States v. Gates, supra*, 176 F. 2d at page 80, that: "Such a rule would in effect transfer from the court to the witness the management of the trial with respect to the admission and exclusion of evidence, since it would enable the witness to determine what testimony to give and what to withhold"—I ordered the defendant committed "to the custody of the * * * Marshal for imprisonment * * * until such time as she * * * purge herself of the contempts by answering the questions ordered to be answered * * *"

The criminal trial then proceeded, with the recalcitrant witness Yates continuing to testify and refusing to answer such questions as she chose not to answer. After both prosecution and defense had rested, the court—expressly declining to excuse defendant Yates as a witness in the case—submitted the issues of fact to the jury. The jury returned a verdict of guilty as to defendant Yates and others, a motion for a new trial was presented and denied. *United States v. Schneiderman*, D. C. S. Cal. 1952, 106 F. Supp. 906, judgment was pronounced, and an appeal from the judgment in the criminal case has been taken and is still pending.

Defendant Yates now moves to be released from custody under the civil contempt charge, basing her motion upon the ground that since the criminal trial is at an end there is no longer any reason why she should be coerced to answer.

Where as at bar a witness is imprisoned for civil contempt, "imprisonment * * * is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. * * * to coerce the defendant to do the thing required by the order for the benefit of the complainant. If imprisoned, as aptly said *In re Nevitt* (8 Cir.), 117 F. (448) 451, 'he carries the keys of his prison in his own pocket.' He can end the sentence and discharge himself at any moment by doing what he had previously refused to do." *Gompers v. Bucks Stove & Range Co.*, 1911, 221 U. S. 418, 442, 31 S. Ct. 492, 498, 55 L. Ed. 797.

This power to coerce performance of legal duty is equitable in character. *Gompers v. Bucks Stove & Range Co.*, *supra*, 221 U. S. at page 441, 451, 31 S. Ct. 492, 55 L. Ed. 797; *Bessette v. W. B. Conkey Co.*, 1904, 194 U. S. 324, 327-329, 24 S. Ct. 665, 48 L. Ed. 997; *In re Chiles*, 1874, 22 Wall. 157, 168-169, 89 U. S. 157, 168-169, 22 L. Ed. 819. It exists for an equitable purpose, and duration of the power in a given instance is co-extensive with existence of the purpose. *Gompers v. Bucks Stove & Range Co.*, *supra*, 21 U. S. at pages 451-452, 31 S. Ct. 492, 55 L. Ed. 797; *In re Debs*, 1895, 158 U. S. 564, 594-596, 15 S. Ct. 900, 39 L. Ed. 1092; *Ex parte Kearney*, 1822, 7 Wheat. 38, 45, 20 U. S. 38, 45, 5 L. Ed. 391; *United States v. Hudson*, 1812, 7 Cranch 32, 34, 11 U. S. 32, 34, 3 L. Ed. 259. That is to say, the power to imprison, in order to coerce an answer from a recalcitrant witness, endures so long as there remains reason to exercise the power in behalf of the litigant for whose benefit it is exerted. *Harris v. Texas & Pacific Ry. Co.*, 7 Cir., 1952, 196 F. 2d 88, 90; 3 Bl. Comm. *444-445; 4 *id.* *283-288.

Hence, if the litigation in the criminal case as between the United States and defendant Yates were now at an end, the pending questions would of course be moot, and the reason for or object of coercive incarceration would have ceased to exist. *United States v. United Mine Workers*, 1947, 330 U. S. 258, 295, 67 S. Ct. 677, 91 L. Ed. 884; *Gompers v. Bucks Stove & Range Co.*, *supra*, 221 U. S. at pages 441-442, 451-452, 31 S. Ct. 492, 55 L. Ed. 797; *United States v. International Union*, 88 U. S. App. D. C. 341, 190 F. 2d 865, 873-874; *Parker v. United States*, 1 Cir., 1946, 153 F. 2d 66, 71, 163 A. L. R. 379.

The defendant, urging that the court misapply the rule and thus shorten the time, advances the argument that termination of the trial—rather than termination of the litigation—marks an end to the value or usefulness of the testimony of a witness. In support of this contention the defendant cites cases in which the courts have declared that after discharge of a grand jury, *Howard v. United States*, 8 Cir., 1950, 182 F. 2d 908, 914, reversed on other grounds, 1950, 340 U. S. 898, 71 S. Ct. 278, 95 L. Ed. 651; *Loubriel v. United States*, 2d Cir., 1926, 9 F. 2d 807, 809; *United States v. Collins*, D. C. 1906, 146 F. 553, 554, or after adjournment of a legislature, *Marshall v. Gordon*, 1917, 243 U. S. 521, 542, 37 S. Ct. 448, 61 L. Ed. 881, there is no power to hold a witness in civil contempt of their authority.

But the analogy of a grand jury or legislature does not apply at bar. With respect to the latter, as the Court observed in *Anderson v. Dunn*, 1821, 6 Wheat, 204, 231, 19 U. S. *204, *231, 5 L. Ed. 242, "although the legislative power continues perpetual, the legislative body ceases to exist on the moment of its adjournment

* * * It follows that imprisonment (for civil contempt of that body) must terminate with that adjournment."

Likewise with respect to a grand jury. As Judge Learned Hand said in *Loubriel v. United States*, *supra*, 9 F. 2d at page 809: "Each investigation is separate and independent; it terminates with the grand jury which undertakes it, and the next does not take it up as unfinished business."

While one phase of the case of the United States against defendant Yates—a jury trial resulting in a verdict of guilty—is over, there still remains the pending appeal to the Court of Appeals, and possibly to the Supreme Court; and since the Court of Appeals has held "it appears that the case involves a substantial question which should be determined by the appellate court", Fed. Rules Crim. Proc. 46(a) (2); Order in *Yates v. United States*, 9 Cir., August 29, 1952, No. 13527, both the trial court and the United States must proceed here upon the assumption that either the Court of Appeals or the Supreme Court may order a new trial. 28 U. S. C., §2106.

If a new trial of the criminal case against the defendant Yates should be ordered, answers to the pending questions may become of great importance to the plaintiff for impeachment purposes, in the event defendant Yates should again choose to take the stand.

On the other hand, if defendant Yates should not elect again to take the stand, her entire testimony at the first trial might then be read to the jury by the plaintiff, either as admissions by the defendant, 2 Wharton, Criminal Evidence, §679 (11th ed. 1935); see *Jackson v. State*, 1925, 29 Okl. Cr. 429, 234 P. 228, 229; *West v. State*, 1922, 24 Ariz. 237, 208 P. 412, 416; *People v. Thourwald*, 1920, 46 Cal. App. 261, 189 P. 124, 126-127;

State v. King, 1917, 102 Kan. 155, 169 P. 557, 558, or under the reported-testimony exception to the hearsay rule. See *Mattox v. United States*, 1805, 156 U. S. 237, 240-244, 15 S. Ct. 337, 39 L. Ed. 409; *Smith v. United States*, 4 Cir., 1939, 106 F. 2d 726, 728; American Law Institute, Model Code of Evidence, Rule 511 (1942).

The defendant's testimony at the first trial being voluntarily given, no claim of privilege against self-incrimination as to such reported testimony could be raised. *Caminetti v. United States*, 1917, 242 U. S. 470, 493-495, 37 S. Ct. 192, 61 L. Ed. 442; *United States v. Gates*, *supra*, 176 F. 2d at page 79; see *Johnson v. United States*, 1943, 318 U. S. 189, 196, 63 S. Ct. 549, 87 L. Ed. 704; *cf. Raffel v. United States*, 1926, 271 U. S. 494, 46 S. Ct. 566, 70 L. Ed. 1054.

Thus it is clear that the answers now sought to be coerced from defendant Yates *qua* witness have undeterminable potential value to the plaintiff in the criminal case now pending on appeal. And it is equally clear that this potential value—as yet withheld because of the contumacious conduct of the witness—will continue to exist so long as the criminal case of the United States against Yates continues in the status of pending litigation.

Since the purpose of coercive imprisonment of a recalcitrant witness for civil contempt is aid to the litigant entitled to have the withheld information for the purposes of the pending case, *Penfield v. S. E. C.*, 1947, 330 U. S. 585, 592, 67 S. Ct. 918, 91 L. Ed. 1117; *McCrone v. United States*, 1939, 307 U. S. 61, 64, 59 St. Ct. 685, 83 L. Ed. 1108, and since it appears beyond dispute that the United States is entitled to the answers of defendant Yates for the purposes of the criminal case in the event

another trial should be ordered, it must be held here that the object of coercive incarceration continues to exist, and with it the power of the court "to coerce the defendant to do the thing required by the order for the benefit of the complainant." *Gompers v. Bucks Stove & Range Co.*, *supra*, 221 U. S. at page 442, 31 S. Ct. at page 498.

Both reason and policy argue this result. The imprisonment of defendant Yates, in the language of *In re Nevitt*, 8 Cir., 1902, 117 F. 448, 461, means nothing more than "‘commitment until the party shall make proper submission.’"

As was there said: "‘The law will not bargain with anybody to let its courts be defied for a specific term of imprisonment. There are many persons who would gladly purchase the honors of martyrdom in a popular cause at almost any given price, while others are deterred by a mere show of punishment. Each is detained until he finds himself willing to conform. This is merciful to the submissive, and not too severe upon the refractory. The petitioner, therefore, carries the key of his prison in his own pocket. He can come out, when he will * * *’"

Accordingly defendant Yates' motion to be released from custody for civil contempt must be and is hereby denied.

APPENDIX D.

United States Court of Appeals for the Ninth Circuit.

Oleta O'Connor Yates, Appellant, vs. United States of America, Appellee. No. 13,527. July 26, 1955.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Stephens, Fee and Chambers, Circuit Judges
James Alger Fee, Circuit Judge:

Oleta O'Connor Yates was one of those indicted and on trial as a defendant on a charge of conspiracy to violate the Smith Act. After the close of the government case, all of the defendants rested except four, of whom Mrs. Yates was one. She was the only defendant there who testified. Yates vs. United States, 9 Cir., F. 2d Upon cross-examination, she refused to answer any of four questions. Upon direction of the court to respondent, she still refused. Thereupon, the trial judge signed a certificate with four specifications setting up the refusals. A judgment was entered committing her to the custody of the Marshal for imprisonment "until such time as she may purge herself of the contempts by answering the questions ordered to be answered in each instance or until further order of the court." Notice of appeal from this order of June 26, 1952, was immediately filed. Defendant Yates continued under cross-examination for three days, during which time she refused to answer other like questions. She continued in custody during the rest of the trial. Upon conviction in the conspiracy case, she was confined with the other defendants until August 30, 1952. All of the others were then released upon posting bail,

The Marshal refused to release Mrs. Yates until the judge then presiding gave a specific order releasing her until the matter could be heard by the trial judge who had committed her for contempt originally. On September 3, 1952, the minutes recite that "defendant is ordered back into physical custody of the U. S. Marshal pursuant to the order of June 26, 1952, *re* civil contempt" and that a bench warrant issue. This order was passed by Hon. William Mathes, who had presided at the original trial. An appeal was taken from this order. Pending hearing, this Court stayed execution on the order and relieved Mrs. Yates of recommitment.

The confusion as to meaning of words existing here is blameworthy. There is no essential dichotomy between "civil" and "criminal" contempt. The power of the court is inherent and can only be removed when the court is abolished. This prerogative is based upon the federal Constitution. When "inferior courts" are created by Congress, each possesses this authority by virtue of its existence. The Supreme Court has expressly held that coercive measures to superinduce obedience and penalties for defiance may be imposed by the same court upon the same individual for the same act.¹ Indeed, the sanctions may be the same. Imprisonment which involves deprivation of personal freedom is applied indifferently. A fixed term or an indefinite one which might last longer seems to make no distinction of practical value to a prisoner. The judge might well take steps to release one no longer defiant who had been sentenced to a fixed term. Even the unexpressed purpose of the judge to coerce or punish

¹United States vs. United Mine Workers, 330 U. S. 258, 296, 300.

is no test. As the maxim of equity, it serves the purpose of all who appeal to it. If we become involved in the bog of signification of phrases, the clear way will be lost.

Where the United States is prosecuting a criminal case, and a defendant as a witness refuses to answer after order by the court, it seems a contradiction in terms to call the refusal a "civil" contempt. The defiance of the order is committed in the face of the court. Procedural safeguards are thus unavailable and unnecessary.² The power of the court to proceed in an orderly manner is cardinal. The right of a defendant to testify in his own defense was formerly denied by the criminal courts of common law. Now, if he voluntarily takes the stand, under elaborate safeguards to prevent a coerced consent, a defendant may tell his own story in his defense. But this privilege, of inestimable value, is accorded upon the condition that he be cross-examined. Whether the purpose of the judge then be coercion or retribution, where a defendant has abused this privilege by refusal to testify in a criminal trial, the vindication of the authority of the tribunal is essential. The sanction, whether indefinite in duration or fixed in time, under such circumstances, has a strong flavor of punishment.

As to the primary order, there is no question. The trial court was well within the channels of power. It would be subversive of our system of trials, where a defendant is not compelled to testify, to permit him to testify voluntarily to that which he wishes and on the other hand refuse to answer on cross-examination any question which he might believe embarrassing. He cannot be compelled

²Of course, no such problem was here involved as developed in *Offutt vs. United States*, 348 U. S. 11.

to testify at all. No comment upon his failure to testify can be made by the prosecution—a feature which we sincerely hope is never eliminated from the federal system. But, where one waives this immunity and voluntarily gives testimony, he should not be permitted to pick and choose that which he will answer.

The questions here propounded were material, if not vital, to the main issue of conspiracy. Mrs. Yates had fair opportunity to answer, was expressly warned and refused with full knowledge of the consequences. The confinement as a result was proper exercise of the authority of the trial judge. The order of June 26, 1952, was valid.

It has, however, been now called to our attention that the trial at which the witness was ordered to testify has ended. This circumstance highlights the situation in the second appeal which was taken from the order of September 8, 1952, directing that Mrs. Yates be recommitted to custody, in accordance with the previous order, based upon the continued failure to testify. Termination of the original proceeding was a circumstance requiring consideration by the trial court before further action was taken. All concepts of the common law indicate a criminal trial is an entity. From ancient times, it was a proceeding before one judge and one jury. Even modernly, it has been held that the same judge was an essential to a criminal trial and another could not be substituted by consent of defendant and his counsel.³ The doctrine of waiver has been invoked to permit less than the mystic twelve to sit as jurors and for substitutions of jurors to be made. It was not the avowed intention to

³United States vs. Freeman, 2 Cir., 227 Fed. 732.

change the guaranties by these innovations, and certainly no argument can be drawn that due process was subverted thereby.

In any event, once a verdict is returned and the jury is discharged, the trial is ended. Once so concluded, a trial is ended forever. The situation can never be re-created. This defendant, or some of the defendants or other people, may be retried on the same charge by the same judge and the same jury, but the trial is not the same. It is true, that, if we followed the analogies of civil cases, in which coercive measures in order to enforce the mandates of the court have been employed, the principle which was followed by the trial judge here would rule the proceeding.⁴ So long as the private litigant, including the United States as a plaintiff in a civil case, can gain by coercive measures, the court is at liberty to use them even though the immediate trial may have come to an end.⁵

The trial court recognized that the only cases which involve this peculiar situation of prosecution by the United States are contrary to the position taken in this case. Where a witness has been called to testify before a grand

⁴Even in the cases where coercion is the entire objective, care must be exercised that the proceedings out of which the necessity for compulsion arose shall not have terminated. For even there, if the main proceeding is ended, the contempt is abated. *Harris vs. Texas & Pacific Railway Co.*, 7 Cir., 196 F. 2d 88, 90; *Parker vs. United States*, 1 Cir., 153 F. 2d 66, 71; *United States vs. International Union, D. C. Cir.*, 190 F. 2d 865, 874. And see *United States vs. United Mine Workers of America*, 330 U. S. 258; *Gompers vs. Bucks Stove & Range Co.*, 221 U. S. 418, 451.

⁵The distinction lies in the continuance of the duty. The requirement that one produce records for an administrative body may be of indefinite continuance. No case has been cited to us indicating that the duty of a witness to answer even in a civil case extends beyond the discharge of the jury in the particular case.

jury and the grand jury has been discharged,⁶ the use of coercive measures upon the witness would be erroneous. The reason for this is obvious enough. The grand jury has gone out of session. The proceeding before the same body cannot be revived. If the witness were ordered to testify or wished to testify, there is no body before which the testimony could be received. Even if it were postulated that these answers were part of the original cross-examination, since the jury was discharged, the guarantee of the Constitution would apply to an answer then compelled. It is probable that the force of the oath which she took in that proceeding had been extinguished by the discharge of the jury. While it is true that perhaps the court might accept the acquiescence of the witness in giving the information under oath as a purging of the contempt, the situation cannot be recreated. This ending may be likened to the fall of the bridge. The bridge may be rebuilt, but it is not the same bridge. All the orders of a court requiring a person to cross the first bridge are vain once it has been swept away. The problem is more baffling than that faced by all the King's horses and all the King's men. This situation is even more dramatic in the trial of a defendant in a criminal case. There, concepts of jeopardy have sway.

This Court recognizes that the answers to the questions by Mrs. Yates may still be of great importance to the

⁶Howard vs. United States, 8 Cir., 182 F. 2d 908, 914, reversed on other grounds, 340 U. S. 898; Loubriel vs. United States, 2 Cir., 9 F. 2d 807, 809; United States vs. Collins (D. C.), 146 Fed. 553, 554.

government of the United States in this or other future criminal prosecution. It might be of great advantage if there were a retrial to have the information. Her attitude was contemptuous and defiant.⁷ But, after the end of the trial, it was error to attempt to coerce this witness into testifying before a jury which had been disbanded and could not be legally recalled.

The order of June 26, 1952, was valid and is affirmed. It was error, however, to direct confinement thereunder after the close of the main trial. The order of September 8, 1952, is reversed.

Stephens, Circuit Judge, concurring.

I concur in the result.

(Endorsed:) Opinion and Concurring Opinion. Filed July 26, 1955. Paul P. O'Brien, Clerk.

⁷Even though the "petitioner * * * carries the key of his prison in his own pocket" and "can come out when he will" (*In re Nevitt*, 8 Cir., 117 Fed. 448, 461) does not render it less erroneous for the court to recommit when the duty to answer has been dissipated by discharge of the trial jury.

APPENDIX E.

United States v. Yates. Cr. No. 22467. United States District Court. S. D. California, C. D. Sept. 8, 1952. Mathes, District Judge.

18 U. S. C., §401 declares that: "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority * * * as * * * (3). Disobedience * * * to its lawful * * * order * * * or command."

Contempt of court is thus declared to be a public offense*—a crime; and Rule 42(a) of the Federal Rules of Criminal Procedure, 18 U. S. C. provides that: "A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." See *Sacher v. United States*, 1952, 343 U. S. 1, 9-11, 72 S. Ct. 451, *Id.*, 2 Cir., 1950, 182 F. 2d 416; *MacInnis v. United States*, 9 Cir., 1951, 191 F. 2d 157, certiorari denied, 1952, 343 U. S. 953, 72 S. Ct. 628; *Hallinan v. United States*, 9 Cir., 1950, 182 F. 2d 880, certiorari denied, 1951, 341 U. S. 952, 71 S. Ct. 1010, 95 L. Ed. 1375; *United States v. Gates*, 2 Cir., 1949, 176 F. 2d 78.

While on trial under an indictment charging conspiracy, 18 U. S. C., §371, to violate the Smith Act, 54 Stat. 670, 1940; 18 U. S. C., 1946 ed., §10; *id.* 1948 ed., §2385, defendant Oleta O'Connor Yates chose to take the witness stand in her own defense. Upon cross-examination she declined to answer certain questions, and repeatedly persisted in her refusal after being instructed by the court to answer.

The criminal trial was interrupted and a hearing had. 85 Tr. 11325-11354, 11367-11477. Upon this hearing counsel for the defense conceded that the questions which the defendant as witness blatantly refused to answer were properly put to her, and that "unquestionably this is exclusively within the court's sound discretion." See *United States v. Toner*, 3 Cir., 1949, 173 F. 2d 140, 144; Fed. Rules Crim. Proc. 52(a).

The court thereupon ordered the defendant committed "to the custody of the * * * Marshal * * * until such time as she * * * purge herself of the contempts by answering the questions ordered to be answered. * * *

The criminal trial then proceeded, with the recalcitrant witness Yates continuing to testify and refusing to answer such questions as she chose not to answer. After both prosecution and defense had rested, the court—expressly declining to excuse defendant Yates as a witness in the case—submitted the issues of fact to the jury. The jury returned a verdict of guilty as to defendant Yates and others, a motion for a new trial was presented and denied *United States v. Schneidermann*, D. C. S. D. Cal. 1952, 106 F. Supp. 906, judgment was pronounced, and an appeal from the judgment in the criminal case has been taken and is still pending. The Court of Appeals has ordered defendant Yates released on \$20,000 bail pending the appeal in the criminal case. See order in *Yates v. United States*, No. 13527, 9 Cir., August 29, 1952.

Defendant Yates thereafter moved to be released from custody under the civil contempt charge, basing her motion upon the ground that since the criminal trial is at an end there is no longer any reason why she should be coerced to answer.

This court denied the motion to release the defendant from coercive custody. See *United States v. Yates*, D. C. S. D. Cal. 1952, 107 F. Supp. 408. The defendant appealed and the Court of Appeals has ordered her release on \$1,000 bail pending that appeal. See order *Yates v. United States*, No. 13535, 9 Cir., Sept. 5, 1952.

The United States now presents a motion to punish the witness Yates for criminal contempt by reason of her wilful disobedience to the orders of the court that she answer the unanswered questions.

(1) Where a witness is imprisoned for civil contempt, "Imprisonment * * * is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. * * * to coerce the defendant to do the thing required by the order for the benefit of the complainant. If imprisoned, as aptly said *In re Nevitt* (8 Cir.), 117 F. (448) 451, 'He carries the keys of his prison in his own pocket.' He can end the sentence and discharge himself at any moment by doing what he had previously refused to do." *Gompers v. Bucks Stove & Range Co.*, 1911, 221 U. S. 418, 442, 31 S. Ct. 492, 498, 55 L. Ed. 797.

(2, 3) The power of a court to coerce performance of legal duty is equitable in character. *Gompers v. Bucks Stove & Range Co. supra*, 221 U. S. at page 441, 451, 31 S. Ct. 492, 55 L. Ed. 797; *Bessette v. W. B. Conkey Co.*, 1904, 194 U. S. 324, 327-329, 24 S. Ct. 665, 48 L. Ed. 997; *In re Chiles*, 1874, 22 Wall. 157, 168-169, 89 U. S. 157, 168-169, 22 L. Ed. 819. It exists for an equitable purpose, and duration of the power in a given instance is co-extensive with existence of the purpose. *United States v. United Mine Workers*, 1947, 330 U. S. 254, 295, 67 S. Ct. 677, 91 L. Ed. 884; *Gompers v. Bucks Stove*

& Range Co., *supra*, 221 U. S. at pages 441-442, 451-452, 31 S. Ct. 492; *In re Debs*, 1895, 158 U. S. 564, 594-596, 15 S. Ct. 900, 39 L. Ed. 1092; *Ex parte Kearney*, 1822, 7 Wheat, 38, 45, 20 U. S. 38, 45, 5 L. Ed. 391; *United States v. Hudson*, 1812, 7 Cranch 32, 34, 11 U. S. 32, 34, 3 L. Ed. 259; *Harris v. Texas & Pacific Ry. Co.*, 7 Cir., 1952, 196 F. 2d 88, 90; *United States v. International Union*, 88 U. S. App. D. C. 341, 190 F. 2d 865, 873-874; *Parker v. United States*, 1 Cir., 1946, 153 F. 2d 66, 71, 163 A. L. R. 379; 3 Bl. Comm. *444-445; 4 *id.* *283-288.

(4) This equitable power to imprison a recalcitrant witness in an effort to coerce an answer for the benefit of a litigant is not derived from the quoted provisions of 18 U. S. C. §401, but is an inherent power possessed from the beginning by federal courts in the exercise of their equity jurisdiction, which parallels that exercised by the English Court of Chancery at the time our Constitution was formed. See *Sprague v. Ticonic Bank*, 1939, 307 U. S. 161, 164-165, 59 S. Ct. 777, 83 L. Ed. 1184; *Atlas Life Ins. Co. v. W. I. Southern, Inc.*, 1939, 306 U. S. 563, 568, 59 S. Ct. 657, 83 L. Ed. 987; *Pennsylvania v. Wheeling Bridge Co.*, 1851, 13 How. 518, 563-564, 54 U. S. 518, 563-564, 14 L. Ed. 249; *Boyle v. Zacharie*, 1832, 6 Pet. 648, 658, 31 U. S. 648, 658, 8 L. Ed. 532.

(5) While the authorities speak of "civil" contempt and "criminal" contempt as if they were two entirely separate and distinct matters, the same act of disobedience usually constitutes both. In the last analysis, the distinction between the two depends entirely upon what power of the court is invoked against the contemnor.

(6) If coercive or compensatory power of the court is exerted upon the contemnor solely for the benefit of a litigant, such exercise of equity jurisdiction involves the civil power of the court, and hence the proceeding is termed

"civil" contempt. Matter of Christensen Eng. Co., 1904, 194 U. S. 458, 24 S. Ct. 729, 48 L. Ed. 1072; Worden v. Searls, 1887, 121 U. S. 14, 24-26, 7 S. Ct. 814, 30 L. Ed. 853.

(7) On the other hand, if the punitive or penal power of the court is exerted upon the Contemnor, the court's criminal power to punish for the commission of a public offense is necessarily invoked, 18 U. S. C. §§401, 402, and such a proceeding is called "criminal" contempt. Gompers v. Bucks Stove & Range Co., *supra*, 221 U. S. at pages 441-443, 31 S. Ct. 492; *In re Debs*, *supra*, 158 U. S. at pages 593-596, 15 S. Ct. 900; Savin *Ex parte*, 1889, 131 U. S. 267, 9 S. Ct. 669, 33 L. Ed. 150; Cuddy, *Ex parte*, 1889, 131 U. S. 280, 9 S. Ct. 703, 33 L. Ed. 154; *Ex parte Terry*, 1888, 128 U. S. 289, 9 S. Ct. 77, 32 L. Ed. 405; *cf. In re Merchants' Stock & Grain Co.*, Petitioner, 1912, 223 U. S. 639, 32 S. Ct. 339, 56 L. Ed. 584; Doyle v. London Guarantee & Accident Co., 1907, 204 U. S. 599, 27 S. Ct. 313, 51 L. Ed. 641; Alexander v. United States, 1906, 201 U. S. 117, 26 S. Ct. 356, 50 L. Ed. 686; Beale, Contempt of Court, Criminal and Civil, 21 Harv. L. Rev. 11 (1908).

Thus the same act of contempt may result in invoking the equitable power of the court in an effort to coerce compliance, and also in invoking the criminal power of the court to impose a definite sentence of imprisonment by way of punishment. (*Penfield Co. v. S. E. C.*, 1947, 330 U. S. 585, 590, 593-594, 67 S. Ct. 918, 91 L. Ed. 1117).

If, therefore, the equitable power of the court fails of its coercive purpose or cannot for some reason be invoked, *cf. United States v. Yates*, *supra*, *Yates v. United States*, *supra*, such a contingency is "without prejudice to the power and right of the court to punish contempt * * *." *Gompers v. Bucks Stove & Range Co.*, *supra*, 221 U. S. at pages 451-452, 31 S. Ct. at page 502; *Alexander v.*

United States, *supra*, 201 U. S. at page k22, 26 S. Ct. 356; *Bessette v. W. B. Conkey Co.*, *supra*, 194 U. S. at pages 327-334, 24 S. Ct. 665; *In re Debs*, *supra*, 158 U. S. at pages 593-594, 15 S. Ct. 900; *cf. Michaelson v. United States ex rel.*, 1924, 266 U. S. 42, 64-67, 45 S. Ct. 18, 69 L. Ed. 162.

And as Mr. Justice Lamar was moved to observe in the *Gompers* case, *supra*, 221 U. S. at page 450, 31 S. Ct. at page 501, "if, upon examination of the record, it should appear that the defendants were in fact and in law guilty of the contempt charged, there could be no more important duty than to render such a decree as would serve to vindicate the jurisdiction and authority of courts to enforce orders and to punish acts of disobedience. For while it is sparingly to be used, yet the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. * * *

If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery."

(8) For the reasons stated, the motion to invoke the criminal power of this court to punish the defendant Yates for contempt pursuant to 18 U. S. C. §401 and Rule 42(a) of the Federal Rules of Criminal Procedure is granted. A certificate of criminal contempt will be filed as provided in Rule 42(a), and an appropriate term of imprisonment imposed.

Appendix.

Certificate, Order and Judgment of Contempt.

(See R. 35, pp. 4-10.)

APPENDIX F.

United States Court of Appeals for the Ninth Circuit.

Oleta O'Connor Yates, Appellant, vs. United States of America, Appellee. No. 13,535. July 26, 1955.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Stephens, Fee and Chambers, Circuit Judges
James Alger Fee, Circuit Judge:

The defendant Yates was on trial with others on a charge of conspiracy. She took the witness stand in her own defense. Upon cross-examination, she declined to answer four questions upon June 26, 1952, although repeatedly ordered by the court so to do. The trial of the criminal case was interrupted. A hearing was had. The trial judge committed the defendant Yates to the custody of the Marshal until she should purge herself of the contempt by answering these four questions. This Court has recently held this commitment ineffective after the trial of the criminal case had ended. Yates vs. United States, F. 2d

The criminal trial was then resumed. Defendant Yates was recalled to the stand. She thereafter, on June 30, refused to answer a series of eleven questions, although expressly directed to do so by the trial court.

Thereupon, the cause was submitted to the jury. A verdict of guilty was returned against defendant Yates and others. Judgment was pronounced on August 7, 1952. This conviction has been affirmed. Yates vs. United States, F. 2d

On August 8, 1952, the court sentenced defendant Yates to a term of one year's imprisonment on each of the eleven counts: said terms to run concurrently with each other but consecutively to the sentence of five years imposed in the main case. This Court has recently affirmed this judgment in criminal contempt.

On September 8, 1952, the government presented a motion to punish defendant Yates for criminal contempt, alleging her willful disobedience to the orders of the court on June 26 in the failure to answer the four questions, in default of which she had theretofore been committed to coercive custody. The court sentenced the defendant to a period of three years for each of the four separate contempts, the terms to commence and run concurrently, and commitment issued thereon. Defendant was taken into custody on September 8 and commenced service of this sentence. The court subsequently modified the judgment to provide that the terms of imprisonment were to take effect after the release of defendant from custody following service of the sentence in the main case.

Appeal has been taken from this order.

This situation is complex. To overcome the refusal of the defendant in a criminal case to answer these four questions, the court had committed her. While upon the witness stand during this confinement, Mrs. Yates had refused to answer eleven other questions of a similar nature, and was thereupon sentenced to imprisonment for a year as a punishment. This conviction has been upheld. It was expressly decided there that the two occasions were

separate and distinct, and different corrective and punitive measures were within the competence of the court.

If the trial judge, at the same time and as part of the same judgment, had imposed a coercive confinement for an indefinite period and punitive imprisonment for a fixed term thereafter¹ for failure to answer these four questions, perhaps the difficulty might have been dissipated. As has been heretofore pointed out, the confusion of the language, if not the underlying concepts,² complicates the situation where, as here, there are two judgments pronounced at different times.

The purpose of the judge in the first commitment is by no means clear because of the confusion in the authorities. It seems the vindication of the power of the tribunal and necessity of an example for the enlightenment of other suitors might well have entered the consciousness if not the volition of the judge. Such factors as well as coercion of defendant might have characterized the purpose of the court when decreeing the first confinement. The judgment may well have been punitive as well as coercive.

The trial court may have conceived that defendant had made up her mind not to answer the questions before she went on the stand. The severity of the sentence which is now under consideration can be justified upon the theory

¹United States vs. United Mine Workers, 330 U. S. 258, 295.

²When a slightly different problem arises in this field, the authorities are of little help. See especially the main opinion, concurring opinion and dissenting opinion in *Penfield Co. vs. Securities & Exchange Commission*, 330 U. S. 585, 595, 603, and *Sacher vs. United States*, 343 U. S. 1.

that it was the intention of this defendant to achieve martyrdom by defying what she would probably characterize as the bourgeois institution of common law courts and to proclaim fanatic loyalty to the cause and at the same time by æsopian language set up humanitarian motives as a basis for her refusal. If the trial judge believed the consistent refusal was part of a concerted action to bring into disrepute the jury trial as an instrumentality of democratic government, then it was his duty to punish and ours to affirm.³ Both courts must be meticulously careful to observe the safeguards, procedural and substantive.

It has already been intimated that there are serious dangers inherent in postponing a punitive sentence for contempt. But a judge in a criminal trial is in a dilemma which requires judgment almost superhuman to solve correctly. A punitive sentence for contempt upon a defendant in a criminal case might seriously prejudice his standing before the trial jury. The peculiar nature of proceedings for contempt permits temporary coercive measures followed by imprisonment for a fixed term as punishment.⁴ But, while coercion is applied, the defendant in the criminal case is entitled to know he may yet be subjected to a definite penalty for contempt and that

³United States vs. Gates, 2 Cir., 176 F. 2d 78; United States vs. Green, 2 Cir., 176 F. 2d 169; United States vs. Winston, 2 Cir., 176 F. 2d 163. See also United States vs. Hall, 2 Cir., 198 F. 2d 726.

⁴There is no denial here that a criminal contempt is punishable in an independent proceeding divorced from the original cause, in the course of which it may have occurred.

the coercive restraint is not intended to relieve him of the punishment for the criminal refusals which he has already uttered.

In any event, the intellectual confusion noted prevents us from denominating the two periods of custody under two different judgments for the same four refusals as double jeopardy for the same acts. If then the record had shown a definite notification to defendant at an appropriate time, the coercive and punitive sanctions might have been successively applied. But the concept of due process of law is an additional safeguard. The notions inherent therein will not permit, without prior positive notification, what otherwise might be viewed as the indefinite confinement of a defendant in a criminal case pending his submission as a witness to authority, and then, when imprisonment has had no effect, the punishment of the refusal of obedience by incarceration for a term of years.⁵

Judgment reversed.

(Endorsed:) Opinion. Filed July 26, 1955.

Paul P. O'Brien, Clerk.

⁵Since proceedings in contempt are *sui generis*, here the whole course of action in the criminal trial and all the subsequent proceedings must be appraised.

APPENDIX G.

18 U. S. C., SECTION 401

Power of court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701.

FEDERAL RULES OF CRIMINAL PROCEDURE—RULE 42 Criminal Contempt

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged

and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

APPENDIX H.

<u>Name of Case</u>	<u>Character of Offense</u>	<u>Sentence</u>
<i>Offutt v. United States</i> , 208 F. 2d 842 (C.A.D.C. 1953)	Lawyer—Gross discourtesy to Court	Reduced from 10 days to 48 hours
<i>Cooke v. United States</i> , 267 U. S. 517	Scandalous letters and jury shadowing	30 days
<i>Hoffman v. United States</i> , 13 F. 2d 278 (C.A. 7, 1926)	Sheriff permitted prisoner to go at large	\$200 fine
<i>Hallinan v. United States</i> , 182 F. 2d 880 (C.A. 9, 1950)	Lawyer—Deliberate disobedience of orders of Court	6 months
<i>MacInnis v. United States</i> , 191 F. 2d 157 (C. A. 9, 1951)	Lawyer—Abuse of Court	3 months
<i>Huffman v. United States</i> , 148 F. 2d 943 (C. A. 10, 1945)	Deliberate violation of injunction	\$1,000 fine
<i>McCann v. N. Y. Stock Exchange</i> , 80 F. 2d 211 (C.A. 2, 1935)	Deliberate violation of injunction	\$250 fine
<i>In re Maury</i> , 205 Fed. 626 (C. A. 9, 1913)	Lawyer—Disrespectful statements to Court	\$500 fine
<i>United States v. Landes</i> , 97 F. 2d 378 (C.A. 2, 1938)	Lawyer—Disrespect and disobedience of orders of Court	\$50 fine
<i>In re Gompers</i> , 40 App. D.C. 293, 337	Deliberate violation of injunction	30 days for one def't.; \$500 each for two other defendants
<i>Western Fruit Growers v. Gotfried</i> , 136 F. 2d 98 (C.A. 9, 1943)	Deliberate violation of injunction	\$1,000, \$500, \$250 fines, respectively
<i>United States v. Sacher, et al.</i> , 343 U.S. 1	Lawyers—Abuse and disrespect	6 months, 4 months, 30 days, respectively
<i>Tosh v. W. Ky. Coal Co.</i> , 252 Fed. 44 (C.A. 6, 1918)	Deliberate violation of injunction	60 days
<i>Russell v. United States</i> , 86 F. 2d 389 (C.A. 8, 1936)	Deliberate interference with enforcement of writ	4 months
<i>Penfield Co. v. Sec. & Ex. Comm.</i> , 330 U.S. 585	Refusal to produce books	\$50 fine
<i>In re Stein</i> , 7 F. 2d 169 (D.C. N.D. Calif., 1925)	Refusal of bankrupt to be examined	3 months
<i>Duell v. Duell</i> , 178 F. 2d 683 (C.A.D.C., 1948)	Refusal to produce books	30 days
<i>Levinstein v. E. I. DuPont de Nemours & Co.</i> , 258 Fed. 662 (D.C. Del., 1919)	Refusal to obey subpoena	\$500 fine

Service of the within and receipt of a copy thereof is hereby admitted this.....day of November, A. D. 1955.

FILE COPY

DEC 30 1955

HAROLD B. WILEY, C.

No. 547 15 2

In the Supreme Court of the United States

OCTOBER TERM, 1955

OLETA O'CONNOR YATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 547

OLETA O'CONNOR YATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (A. 1) has not yet been officially reported.¹

JURISDICTION

The judgment of the court below (A. 9) was entered on July 26, 1955. A petition for rehearing was duly filed, and was denied on November 2, 1955. The petition for a writ of certiorari was filed on November 30, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

¹ "Tr." refers to the typewritten transcript of record in *Yates, et al. v. United States*, Nos. 308, 309, 310; "R" refers to the printed transcript of the record for this case, No. 547; "Pet." refers to the petition for a writ of certiorari in this case; "A" refers to the appendix to the petition.

QUESTIONS PRESENTED

1. Whether punishment for civil contempt for petitioner's refusal to answer, on cross-examination, certain questions on June 26, 1952, bars punishment for criminal contempt for refusal to answer comparable questions, while she was still under cross-examination, on June 30, 1952.

2. Whether it was proper to impose a punitive sentence for refusal to answer these questions on cross-examination.

3. Whether the sentence imposed was excessive.

STATUTORY PROVISION AND RULES INVOLVED

Title 18, United States Code, provides in respect to contempt as follows:

§ 401. POWER OF COURT.

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

The Federal Rules of Criminal Procedure provide:

RULE 35. CORRECTION OR REDUCTION OF SENTENCE.

The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

RULE 42. CRIMINAL CONTEMPT.

(a) SUMMARY DISPOSITION. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

STATEMENT

On June 26, 1952, and June 30, 1952, petitioner and thirteen co-defendants were on trial in the District Court for the Southern District of California, under an indictment charging conspiracy to violate the Smith Act, 18 U. S. C. (1946 ed.), 10 and 11; *id.* (1948 ed.), 371 and 2385. The indictment alleged that they, along with twelve named co-conspirators, conspired (1) to advocate and teach the duty and necessity of overthrow of the United States Government by force and violence; and (2) to organize and help to organize

the Communist Party of the United States of America which teaches and advocates the overthrow and destruction of the United States Government by force and violence, all with the intent of causing the aforesaid overthrow by force and violence as speedily as circumstances would permit.

After the Government completed its case, petitioner took the stand in her own defense. On direct examination, she denied that she had ever agreed or conspired with anyone to advocate the overthrow of the government of the United States by force and violence; or that, according to her understanding, the Communist Party had ever had that purpose; or that she had ever had the intent to overthrow the United States Government by force or violence (80 Tr. 10703, 83 Tr. 11099, 84 Tr. 11159-11160).

On June 30, 1952, while under cross-examination, petitioner refused to answer eleven questions concerning her association with other alleged co-conspirators (Spec. I-~~IX~~). Three of the questions concerned Leon "Kappy" Kaplan. The evidence introduced by the Government showed that Kaplan had participated on a high level in Communist Party affairs in San Francisco. Kaplan's activities had been testified to by Government witness Van Dorn (59 Tr. 7903, 7930; 60 Tr. 8023, 8025, 8026, 2028, 8037). In addition, witness Honig testified that Kaplan had attended

meetings of the State and County Board of the Communist Party in 1947 and 1948 and had actually arranged one of the meetings (42 Tr. 5438-5444, 5453-5454). On cross-examination, petitioner admitted that she had been present at some of the Board meetings. When she was asked who else was present (87 Tr. 11618-11619), the following colloquy occurred:

A. No, I am sorry I can't for the same reasons that I advanced last week. I feel that these people are in a position where my identification of them as communists would do them an inestimable amount of damage. I am willing to give names of people whom I know I cannot hurt, but where it is a question of damaging their interests, or harming their ability to make a livelihood, of hurting their families, No.

Q. People that are employed by the Communist Party would not be discharged, would they, by having their names revealed?—A. People who may be employed by the Communist Party would not be discharged by having their names revealed, but members of their families can suffer the results of it in many different ways.²

² On June 26, when the Government began cross-examination, the petitioner identified defendant Carlson as one whom she had met at the Communist Party offices in Los Angeles (85 Tr. 11231-11233). She was then asked whom else of the defendants she had met there in connection with her duties and she refused to answer for the reason that she did not want to add to the prosecution case against them and

The petitioner then refused to answer (Spec. I) whether she was ever present at a State board meeting or any other meeting of the Communist Party when Kaplan was present; (Spec. II) whether, according to her understanding, Kaplan was a member of the Communist Party in 1948; and (Spec. III) whether she was present at many meetings of the Communist Party where Kaplan was present (R. 3-5). In each instance she was instructed by the court to answer and upon her refusal to do so was declared to be in contempt.

thereby become a Government informer (85 Tr. 11234-11235). When directed by the court to answer, she reiterated her reason by stating, "I just will not be an informer, I will not play the role of a witness for the Government, I will not add to the prosecution case against people who have rested, who are putting on no further defense." (85 Tr. 11239.) In the afternoon session petitioner refused to answer, when directed by the court, four questions concerning her association with Harry Glickson and Frank Spector (85 Tr. 11309-11319). At the conclusion of the day's trial, the judge committed her to the custody of the Marshal for imprisonment "until such time as she may purge herself of the contempts by answering the questions ordered to be answered in each instance or until further order of the court" (85 Tr. 11372-73). After the trial, the judge directed her continued confinement to coerce her to answer the four questions put to her on June 26. The Court of Appeals reversed, holding that this was error since the jury had been disbanded and could not be legally recalled (A. 23). After the trial, the trial judge also imposed a punitive sentence on her for the contempt committed on June 26. The Court of Appeals also reversed this conviction, holding that, if the judge meant to impose a punitive sentence, she should have been so warned when the coercive measures were being applied (A. 33).

The fourth specification involved a question concerning Ida Rothstein (R. 5-6). Ida Rothstein had been shown as an important member of the conspiracy by the testimony of the following Government witnesses as to her activities and attendance at Communist Party meetings: Foard, 33 Tr. 4425-4429, 4432, 4435, 4438, 4447; 34 Tr. 4474; 36 Tr. 4742-4743, 4749; 37 Tr. 4773, 4777, 4811-4812, 4824-4825; Bessie Honig, 42 Tr. 5432, 5438-5444, 5450-5453; Addy, 51 Tr. 6589, 6591, 6594, 6596. The defense had introduced Exhibits GA and GB, indicating Ida Rothstein's importance in the Communist Party as far back as 1933. She had attended and helped to arrange the State and County Board meetings which petitioner had attended (42 Tr. 5438-5444, 5453-5454). She had also attended the Communist Party meetings where Glickson had made statements which petitioner had sought to disclaim on her direct examination (83 Tr. 11120, 84 Tr. 11136; see 33 Tr. 4435-4440; 34 Tr. 4475-4476).

When petitioner was asked if Ida Rothstein had not been chairman of Communist Party clubs in San Francisco for the past five or six years, petitioner replied, "That is asking me to say that Ida Rothstein is a Communist." The Government then asked her whether Ida Rothstein was known to her as a member of the Communist Party. Petitioner refused to answer.

The fifth specification involved a question concerning Hersel or Herschel Alexander (R. 6-8). The Government had introduced evidence and exhibits and the defense had introduced exhibits showing that Alexander was an important member of the Communist Party and of the conspiracy charged, including evidence tending to show Alexander's membership on the California State Committee of the Party (6 Tr. 684; 27 Tr. 3699-3670, 3746-3749; 57 Tr. 7617-7620; 58 Tr. 7731). When asked if Hersel Alexander was a member of the California State Committee of the Communist Party for the year 1950, petitioner refused to answer (87 Tr. 11623).

Specifications VI to X involved questions (R. 8-13) put to petitioner concerning her association with certain of the co-defendants on the California State Committee of the Communist Party in 1950. She was asked and answered in the affirmative that she and defendants Schneiderman and Stack were associated together as members of the California State Committee for that year (87 Tr. 11624-11626). She was asked and refused to answer the same question as to defendant Richmond (Spec. VI), defendant Healey (Spec. VII), defendant Spector (Spec. VIII), defendant Fox (Spec. IX), and defendant Lima (Spec. X).³

³ Petitioner's counsel objected to these questions on the ground that these defendants had rested their case, but this argument was abandoned on appeal.

Specification XI involved a question concerning Celeste Strack (R. 13-14). Government witness Evans had testified about the Marxist Institute, a Communist Party school, held in 1949 and 1950 in San Francisco and as to the use there of Exhibit 163, a study outline for the school; this outline contained references to many of the main writings expounding the violent overthrow of Government. Evans had stated that Celeste Strack was one of the instructors (26 Tr. 3541-3544). Petitioner Yates had testified extensively on direct examination that she had actually prepared Exhibit 163, and as to her participation in the Marxist Institute (77 Tr. 10271, 10275-10278; 79 Tr. 10547; 80 Tr. 10695). When petitioner was asked whether Celeste Strack was, for a number of years, State Educational Director of the Communist Party of the State of California, she refused to answer.*

* Petitioner had also testified on direct examination that she was chairman of the Communist Political Association in San Francisco in 1944 (77 Tr. 10353) and as to the principles of the Communist Political Association in that period (83 Tr. 11096-11100). Government's Exhibit 415 shows that Celeste Strack was likewise a member of this committee in 1944 (Ex. 415, p. 3, 27 Tr. 3842). Additional testimony showed that Celeste Strack, along with petitioner and other co-defendants, was one of the signers and sponsors of co-defendant Doyle's candidacy for a public office (34 Tr. 4560, pp. 14-15 of Ex. 580); and that she had attended meetings of the State Committee, which the defendant Yates had also attended (42 Tr. 5441-5443).

At the conclusion of the session on June 30, and after the jury had been excused, the trial judge stated: "I expect to treat the contempt of the court committed by the defendant Yates in today's session as criminal contempt pursuant to Rule 42 (a). That is my present inclination, and deal with them independently as far as punishment is concerned" (87 Tr. 11634). At the request of counsel, immediate action was deferred (87 Tr. 11635).

On July 8, 1952, an "Order, Judgment and Certificate of Criminal Contempt" was entered as to petitioner for failure to answer the eleven questions put to her on June 30. On August 6, the jury returned its verdict of guilt in the principal case and sentence was imposed on the defendants on August 7. On August 8, petitioner was sentenced to one year for each of the eleven contempts committed on June 30; the sentences were made to run concurrently. However, petitioner was given the opportunity to purge herself and the judge upon sentencing said (R. 37):

I am not interested in imprisoning Mrs. Yates. I am interesting in vindicating the authority of this court, which I feel must be vindicated when anyone wilfully refuses to obey a lawful order of the court.

If she at any time within 60 days, while I have the authority to modify this sentence under the Rules, wishes to purge herself, I

will be inclined even at that late date to accept her submission to the authority of the court.

The Court of Appeals affirmed this conviction (A. 1-8), at the same time that it reversed the contempt orders referred to in footnote 2, *supra*, pp. 5-6.

ARGUMENT

I

Petitioner does not dispute the fact that her refusals to answer constituted contempt (Pet. 22). Rather, she contends that her several refusals amounted to a single offense and that therefore her refusal was total on June 26 when she stated that she would not identify persons as members of the Communist Party no matter how many times she was asked (85 Tr. 11315, Pet. 22).

However, this general statement on June 26 amounted to no more than a blanket advance declaration of her intention not to be cooperative. It could hardly preclude separate convictions for refusals to answer specific questions concerning the activities and status of her various co-conspirators in the Communist Party. The questions put to petitioner were not identical; nor were they all asked on the same day. When petitioner refused to answer four specific questions on June 26, involving two persons, the court committed her to imprisonment until she should

purge herself of the contempt. The questions later put on June 30 were different and involved nine separate persons. The association of petitioner with these people had been shown and, since she had denied any participation in the conspiracy, the status of each was material and relevant (R. 32). The order for contempt did not make repetitious specification of petitioner's general intention not to answer such questions. Instead, it specified individually the eleven questions which petitioner refused to answer on June 30. This was in accordance with Rule 42 (a) of the Federal Rules of Criminal Procedure, and with the federal cases cited by petitioner (Pet. 21) in which the courts have made it clear that it is proper for refusals to answer different questions to be set forth in separate counts.

If petitioner were right, a witness could effectively limit the sanction of contempt by general pronouncements as to the classes of questions he would or would not answer. But such a broad power to "pick and choose" has never belonged to the witness (A. 7), and the courts have not hesitated to use their authority to quell continued defiance. For instance, in *United States v. Costello*, 198 F. 2d 200 (C. A. 2), certiorari denied, 344 U. S. 874, the defendant refused to testify before a Congressional Committee because of illness; he repeated his refusal the next day for the same reason and the court found that the refusals constituted two separate offenses of con-

tempt. In *Fisher v. Pace*, 336 U. S. 155, the court substantially increased a fine and imposed a prison sentence for persistent refusal to obey its order. In *United States v. Bollenbach*, 125 F. 2d 458 (C. A. 2), two judgments were rendered against the defendant for misconduct in the courtroom; the judgments were pronounced on the same day and each sentenced defendant to three months imprisonment, to be served consecutively. See also *Emspak v. United States*, 349 U. S. 190, 193, 195, 203.

It is true that when a witness refuses to give testimony the contempt cannot be multiplied by continuing to ask the same question in different form. The cases petitioner cites are of this class. In *United States v. Orman*, 207 F. 2d 148 (C. A. 3) (Pet. 21), the court found that a defendant could not be charged on two separate counts for contempt in refusing to deliver his book accounts to a Senate Subcommittee, and that two separate refusals to give the name of a person who had loaned money to him should be treated as one offense. In *Fawick Airflex Co. v. United Electrical, R. & M. Wk'rs.*, 92 N. E. 2d 431 (Pet. 21), the holding was that a refusal to answer three separate inquiries as to whether defendant was a Communist should be treated as a single offense. And in *Maxwell v. Rives*, 11 Nev. 213 (Pet. 21), refusal to answer separate questions as to how defendant became possessed of the gold bullion in dispute was treated as one contempt.

This case does not fall under that principle because the separate questions were not mere repetitions of an inquiry petitioner had already refused to answer. The questions did not "seek to establish but a *single fact*, or relate to but a *single subject of inquiry*" (*United States v. Orman, supra*, 207 F. 2d at 160, emphasis added), but rather sought to prove a number of facts and related to at least as many subjects as the persons named in the questions. Petitioner's broad pronouncement on June 26 did not transform the prosecutor's subjects of inquiry from the Communist connections of the various co-conspirators—matters thoroughly relevant to the trial then going on—into a single inquiry into whether petitioner knew any Communists at all. If the latter had been the sole purpose of the series of questions, perhaps petitioner's arguments would have some weight. But that was not the prime or the only purpose of the inquiries, and accordingly petitioner cannot properly claim that the questions were really repetitious or attempts to reframe a single inquiry. By the same token, it makes no difference that her reasons for refusing to answer the various subjects of inquiry were substantially the same; the important factor is the diversity of the subjects, not the identity of the petitioner's motivations.

• We may put aside petitioner's argument that it was possible for her to be sentenced to life, for

her sentences on the separate counts were made to run concurrently. The sentences in the cases cited as in conflict with the decision below (Pet. 21) were consecutive and resulted in prison terms of some years. Likewise, there is no merit to the argument that the sentences violated the constitutional provision against double jeopardy since, as we have shown, the contempts of June 30 were separate and distinct from those of June 26.

Moreover, it should not be forgotten that the order of June 26 was one in civil contempt. According to petitioner's contention that that order exhausted the court's powers, the court would be powerless to impose criminal punishment once it had issued the civil order. But it is settled that contempt may be punished both civilly and criminally, and in separate proceedings. *United States v. United Mine Workers*, 330 U. S. 258, 298-301; *infra*, pp. 15-18.

II

Petitioner contends that the court was without power to impose punitive punishment in proceedings essentially civil in character and purpose (Pet. 23). This argument overlooks the fact that almost any contempt has both civil and criminal characteristics. *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 329; *Lamb v. Cramer*, 285 U. S. 217, 221. A refusal to obey an order of the court is not

only an affront to the dignity of the court, but it may also prejudice the case of the opposing party. If the punishment is punitive—to vindicate the authority of the court and to deter other like derelictions—the contempt is considered criminal. On the other hand, if the defendant is imprisoned to coerce him to do what he has refused to do, and if the imprisonment is merely to continue until he has performed the act, then the contempt is normally a civil one. *United States v. United Mine Workers of America*, 330 U. S. 258; *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 441; *Lamb v. Cramer*, 285 U. S. 217; *Bessette v. W. B. Conkey Co.*, 194 U. S. 324. In *United States v. United Mine Workers*, *supra*, the court found that defendant's conduct amounted to both civil and criminal contempt and imposed a punitive fine of \$700,000 and an additional fine of \$2,800,000 to be paid in the event the defendant did not comply with its order within five days.

The present case was clearly one of criminal contempt. The petitioner refused to answer questions after being ordered by the court to do so. The judge at the conclusion of the day's session advised her: "I expect to treat the contempt of the court committed by the defendant Yates in today's session as criminal contempt pursuant to Rule 42 (a)" (87 Tr. 11634). Upon the request of counsel he did not sentence her

immediately.⁵ She was returned to the custody of the marshal, not because of her failure to answer the eleven questions put to her on June 30, but for her contempt of four days previous. That the order *in this case* was criminal was indicated by the title of the order, by the certificate which specified the manner in which petitioner had defied the court's orders to answer the questions, and by the judgment which stated that she had been convicted of eleven separate criminal contempts by wilful refusal to answer eleven questions in disobedience of the court's order (R. 3-15, 17). Following the sentence, the court again stated that the purpose of the sentence was to vindicate its authority. Furthermore, it was understood by the parties that this was an order in criminal contempt (R. 23). In *United States v. United Mine Workers, supra*, the court treated an order as one in criminal contempt, although it was not described as such, as required by the Criminal Rules, but was so understood by the parties.

This criminal proceeding did not become a civil one because the trial judge indicated that he would modify the sentence within sixty days, under Rule 35 of the Rules of Criminal Pro-

⁵ It is established practice for a trial judge to reserve punishment of contempts by participants in a criminal trial. *Hallinan v. United States*, 182 F. 2d 880 (C. A. 9), certiorari denied, 341 U. S. 952; *MacInnis v. United States*, 191 F. 2d 157 (C. A. 9), certiorari denied, 342 U. S. 953; *Sacher v. United States*, 343 U. S. 1.

cedure, if petitioner would purge herself. This was, as the court below pointed out (A. 3), a matter of grace going to the sentence and to the vindication of the court's authority, not an effort to coerce testimony for the Government's benefit. The trial judge's remarks make it clear that he continued to view the proceeding, at all times, as one to vindicate the court's authority (R. 27-28). And, of course, the fact that the indirect effect of petitioner's purging herself might be of aid to the Government would not change a solely punitive sanction to one which is merely coercive; that is normally true of punishment for criminal contempt. See *Gompers v. Bucks Stove and Range Co.*, 221 U. S. 418, 443.*

III

Petitioner also contends that the punishment of one year for the eleven contempts was excessive (Pet. 26). Punishment for contempt committed in the presence of the court is within the discretion of the trial judge and the higher courts will not intervene unless there has been an abuse of judicial discretion. Cf. *Fisher v. Pace*, 336 U. S. 155, 161; *Ex parte Terry*, 128 U. S. 289, 302-303; *MacInnis v. United States*, 191 F. 2d

* It is not uncommon for sentences in criminal contempt to provide for a fixed term or until such time as the defendant might purge himself. See, e. g., *Field v. United States*, 193 F. 2d 86, 88; 193 F. 2d 92, 94; 193 F. 2d 109 (C. A. 2), certiorari denied, 342 U. S. 894; *Lopiparo v. United States*, 216 F. 2d 87, 91 (C. A. 8), certiorari denied, 348 U. S. 916.

157, 162 (C. A. 9), certiorari denied, 342 U. S. 953; *In re Maury*, 205 Fed. 626 (C. A. 9).

In the present case, petitioner wilfully refused to obey eleven specific orders of the trial judge when directed to do so in his presence. For this offense, the punishment of one year was not excessive. Title 18, Section 402, United States Code, which provides that contempt may be punished by fine, not exceeding \$1,000, or by imprisonment, not exceeding six months, or both, expressly excepts contempt committed in the presence of the court. Title 2, Section 192, United States Code, imposes a maximum sentence of twelve months for refusal to answer any question relative to any subject under investigation in a Congressional Committee. Under this statute judgments have imposed sentences of one year and of eighteen months. *United States v. Orman*, 207 F. 2d 148 (C. A. 3); *United States v. Costello*, 198 F. 2d 200 (C. A. 2), certiorari denied, 344 U. S. 874.¹

¹ The cases cited by petitioner (Pet. 26), in which sentences were reduced, are of an entirely different order. In *United States v. United Mine Workers*, 330 U. S. 258, the court found that a fine of \$3,500,000 against the union for failure to obey an injunction was excessive and modified the judgment; it directed the union to pay a fine of \$700,000 and an additional fine of \$2,800,000 unless it complied with its order within five days. In *Weems v. United States*, 217 U. S. 349, the ruling was that a punishment of a fine of 4,000 pesos and imprisonment in chains for twelve years at hard labor for making false entries in a public record was excessive. In *Sacher v. Association of the Bar of the City of New York*,

Speaking of contempt committed in a court's presence, this Court in *Fisher v. Pace, supra*, 161, stated:

In a case of this type the transcript of the record cannot convey to us the complete picture of the courtroom scene. It does not depict such elements of misbehavior as expression, manner of speaking, bearing, and attitude of the petitioner. Reliance must be placed upon the fairness and objectivity of the presiding judge.

Likewise, the Court of Appeals in *Hallinan v. United States*, 182 F. 2d 880, 888 (C. A. 9), certiorari denied, 341 U. S. 952, pointed out, "We cannot have the same appreciation of an existing situation, from a review of a cold record, as does a presiding judge who witnesses the transgressions and senses the unfavorable impact upon the orderly administration of justice." The trial judge here may well have felt that petitioner took the stand intending not to answer certain questions and that her persistent refusal to answer was part of a course of conduct to flout the authority of the court (A. 33). Whether this was the case was a matter for the trial judge to decide. The sentence imposed was not excessive by the standards

347 U. S. 388, the court held that it was excessive punishment to disbar permanently Mr. Sacher from the practice of his profession for his misconduct during a trial, when Mr. Sacher had already served a six months sentence for the same conduct.

set by statutory and case law. There was no abuse of discretion.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1955.

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FILED

May 18 19

Supplemental Petition for Writ of Habeas Corpus

OLETA C. [illegible]

UNITED STATES DISTRICT COURT

On Petition for Writ of Habeas Corpus of Olea C. [illegible]
[illegible]

PETITION FOR WRIT OF HABEAS CORPUS

By [illegible]
112 West Main Street
Los Angeles 15, California
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IN THE
Supreme Court of the United States

October Term, 1955 .

No. 547

OLETA O'CONNOR YATES,

Petitioner,

vs.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit.

**PETITIONER'S REPLY TO BRIEF IN
OPPOSITION.**

I.

The contempt charges involved four questions asked on one day and eleven questions put two days later during the same cross-examination. There are at least three distinct possibilities as to the number of contempts involved. The first, that there was only a single contempt, is the petitioner's position. The second is that there was one contempt on the first day and another single contempt on the subsequent one; the third, that each question involved a separate contempt, unless two or more questions concerned the same individual and were otherwise substantially identical. Respondent adopts one of the two latter views but does not state which one.

However, respondent's reliance on *United States v. Costello*, 198 F. 2d 200 is some indication that it adopts the view that on each day there was one contempt. In the cited case, the refusal to testify was held to constitute a single separate offense on each day, and multiple counts based on several questions on a single day were reversed. The questions there like those here involved different persons and related to different aspects of association.¹ The Court said:

" . . . when the defendant made his position clear, the Committee could not multiply the contempt, and the punishment, by continuing to ask him questions each time eliciting the same answer: his refusal to give *any* testimony. In other words, the contempt was total when he stated that he would not testify and the refusals thereafter to answer specific questions can not be considered as anything more than expressions of his intention to adhere to his earlier statement and as such were not separately punishable."

¶ Here the petitioner made her position clear at the outset that she would not answer a question which had the effect of her informing on a person as a Communist. Answers to all the questions not answered would have had the effect to which she, from the beginning, refused to lend herself. Her repeated refusals therefore

"can not be considered as anything more than expressions of [her] intention to adhere to [her] earlier statement and as such was not separately punishable."

¹One question was whether the witness had a meeting with William O'Dwyer; another was whether he knew James Moran, and a third, whether he knew Frank Bals.

In *Costello* the witness refused to testify at all. Petitioner's initial refusal was far less comprehensive and embraced only an extremely limited kind of questions, but it did extend to all the questions she thereafter refused to answer just as Costello's did to all questions put to him. If petitioner had said when the first question involved was put to her that she would not answer any further questions at all, there could have been only a single offense. It would be odd indeed if, by restricting her refusal to a small segment of her possible cross-examination, she opened herself up to multiple contempts for innumerable questions within that limited area, while if she refused to testify at all, she could only be found guilty of one offense. It would seem logical therefore that by relying on *Costello*, respondent manifests an intent not to adopt the position that each question presents a separate contempt. Otherwise its position conflicts with *Costello*, and review is required to resolve that conflict.

Respondent's probable reliance on the theory of two separate offenses flows from a misreading of *Costello*. That case is not authority for the proposition that in a single proceeding, without intervention of new factors giving the refusals a different setting, the refusal to answer two questions constitute a single or double offense depending on the mere happenchance as to whether they are asked on the same or different days, or upon the choice of the prosecutor to multiply offenses by putting the questions at separate sessions.

In *Costello* on the first day, a doctor's certificate was produced stating that "the defendant was suffering from acute laryngotracheitis and that he should remain in

bed." (*Ibid.*, p. 203.) On the next day that physician testified before the Committee

"that in his opinion Costello was capable of testifying for an hour or so a day. The defendant was then called before the Committee and informed of this testimony, but he presented another certificate, this time from his regular physician, stating that in the latter's opinion sustained conversation by the defendant would be dangerous to his health." (*Ibid.*, p. 203.)

Then he again refused to answer all questions. It is plain that his second refusal occurred under circumstances quite different from the first and presented a wholly new situation, not merely the coincidence that the questions were put on different days.

It is not surprising that under these circumstances the issue of multiple offenses as between the two days appears not even to have been raised. Here it has been raised because the setting when the two sets of questions were put was identical. Petitioner was undergoing the same cross-examination. Nothing had occurred in the interim which had any bearing on the position she took at the outset. To permit the questions to be considered as separate offenses because they were asked on different days is to confer upon the prosecutor the power to determine whether identical conduct of a defendant shall be penalized as one or as several offenses.

None of the other cases cited by respondent on this issue considered or decided the issue of law under consideration here. *Fisher v. Pace*, 336 U. S. 155 and *United States v. Bollenbach*, 125 F. 2d 458, involved several acts of misconduct in court. The problems arising

out of each situation are quite dissimilar from those arising out of a refusal to answer a certain class of questions followed by the repeated putting of questions in that class. *Emspak v. United States*, 349 U. S. 190 did not reach this point because there was a single punishment for the large number of counts. The pleading of several counts were only a single offense is punishable is, of course, proper practice. (*United States v. Orman*, 207 F. 2d 148, 160 (C. A. 3, 1953). Cf., *Lawson v. United States*, 176 F. 2d 49, 51 (C. A., D. C., 1949).) This is a far different thing from treating some of the questions as one offense and the others as a separate independent offense. Here this is precisely what was done by both the trial and appellate courts.

The trial court proceeded in civil contempt on the first day's questions and also in criminal contempt. (See fn. 6, p. 6, Br. for U. S. in Opposition.) In reversing that judgment the Court of Appeals held that because the trial judge did not notify the Petitioner that he would hold her in criminal contempt at the same time that he sentenced her in civil contempt on the first day's questions he could not thereafter proceed criminally with respect to that offense. (App. F. to Pet. pp. 30, 33-34.) The judgment in this case would necessarily have fallen, too, if the offense had been, according to the opinion of the appellate court, a single offense. Therefore this judgment was affirmed only because the Court deemed the offense separate.

The question as to whether there was more than one offense presents important questions which should be decided by this Court.

II.

Respondent does not dispute the rule that the court is without power to impose punitive punishment in proceedings essentially civil in character and purpose. (Rep. Br. p. 15.) Respondent argues, however, that "any contempt has both civil and criminal characteristics." (Rep. Br. p. 15.) This begs the question because this Court has constantly held that if the *dominant* purpose of the contempt proceedings is to coerce the performance of an act for the benefit of a party litigant, then the proceedings must be deemed civil in character even if the form and incidental effect of the proceedings may have been a vindication of the court's authority. (Pet. pp. 23-25.)

On the real issue in the proceeding, the respondent points only to the form of the contempt order and to an initial statement of the court that it expected to treat the refusals to answer on June 30 as criminal contempt. The record however shows unequivocally, despite the form of the contempt order and the court's statement, that the principal purpose and intent of the proceeding was to compel the petitioner to answer the questions propounded to her by the prosecution during the cross-examination. The court stated time and again in many ways throughout all the contempt proceedings, and even in supplementary proceedings seeking remand, that the answers "have undeterminable potential value to the plaintiff in the criminal case now pending on appeal." (Pet. p. 24.) The record so manifestly establishes the main purpose of the trial court in this proceeding, as well as the other contempt proceedings, to coerce the answers of petitioner after trial that respondent is left with no other recourse than to ignore the record. (See Statement of the Case, Pet. pp. 4-17.)

Respondent makes no claim that the proceeding was solely punitive and it presents nothing from the record to establish that the principal purpose of the proceeding was punitive. On the other hand, the record is undisputably clear and abundant that the dominant purposes was coercive. Under such circumstances, the substantial question presented here is whether such punitive punishment in a contempt proceeding essentially civil is not a violation of the letter and spirit of 18 U. S. C., Section 401, contrary to the applicable decisions of this Court, and a deprivation of petitioner's liberty without due process of law.

III.

(a) Petitioner argues that punishment for summary contempt is within the discretion of the trial court and appellate courts will not intervene "unless there has been an abuse of judicial discretion." (Rep. Br. p. 18.) The claim here is that the sentence of one year imprisonment for refusal to answer similar questions on June 30 during the cross-examination of petitioner was a manifest abuse of discretion. (Pet. pp. 26-32.) Respondent states the problem but does not answer it.

(b) Respondent argues that the sentence is not excessive because 18 U. S. C., Section 402 which provides a maximum sentence of six months or fine of \$1,000, or both, for indirect contempts expressly excepts contempt committed in the presence of the court. Respondent would have this Court assume therefore that the extent of punishment in summary contempt cases is unfettered and without standards. The history of the enactment of 18 U. S. C., Section 401 (Pet. pp. 20, 27) leads to an opposite conclusion. It is true that the six-month limit of imprisonment in Section 402 does not apply here, "though

it ought to have great weight in punishing criminal contempts" under Section 401. (*Ryals v. United States*, 69 F. 2d 946 (C. A. 5, 1934).)

(c) Respondent states that the maximum sentence for legislative contempts (18 U. S. C., Sec. 192) is twelve months and suggests that measured by this standard the sentence here was not excessive. It should be noted, however, that in legislative contempts a maximum of twelve months has been set by Congress despite the fact that the accused in such case is entitled to be tried under an indictment, entitled to confrontation and cross-examination, entitled to subpoena witnesses and present evidence in his own behalf, entitled to be tried before an impartial judge and jury and may be convicted only upon proof of guilt beyond a reasonable doubt. A summary contempt proceeding before a court is stripped of these normal requirements of due process and the punishment is imposed by the very court whose dignity has allegedly been affronted. Reason and policy would seem to dictate a standard far more restrictive on the extent of punishment in summary contempt of court cases than in legislative contempt prosecutions.

(d) Respondent suggests that where elements of "misbehavior" are involved, this Court cannot recreate the real situation from a "cold record"; that the trial judge "may well have felt" that the petitioner took the stand intending not to answer certain questions and that her "persistent refusal was part of a course of conduct to flout the authority of the court." The difficulty with respondent's position is that there is not a semblance of evidence in the record to support its conclusions, and indeed its brief is barren of any record reference to support its conjectures. The entire transcript of the criminal

trial is now on file in this Court. Nos. 308, 309, 310. The transcript of the records in all three contempt proceedings have also been filed with this Court. An examination of these records will reveal that there was not the slightest misbehavior or misconduct on the part of this petitioner. Neither of the courts below made any such finding. Indeed the trial court affirmatively indicated that it understood the scruples of petitioner. (Pet. p. 7.) Petitioner's refusal to answer certain questions was no part of a course of conduct to flout the authority of the court, for aside from her unwillingness to identify persons as members of the Communist Party she answered all other questions put to her on cross-examination fully and frankly. (Pet. pp. 5-6.)

The respondent has declined to acknowledge that there are any standards by which to test the excessiveness of a punitive sentence in a summary contempt proceeding. In effect, while conceding that a sentence may be reviewed when there is "an abuse of judicial discretion," respondent is in reality arguing that such discretion can never actually be reviewed. Respondent ignores the history of 18 U. S. C., Section 401, and the plain legislative intent to limit the drastic power to punish for summary contempt; has ignored the record which demonstrates that there was no actual obstruction to the performance of judicial duty; has glossed over the absence of any misbehavior or disrespect on the part of petitioner by conjecturing some undisclosed intent to flout the authority of the court; has avoided discussion of the fact that the sole reason for refusal to identify persons as Communists was a matter of conscience; and simply refused to consider the uniform federal and state legal precedents which affirm the view that sentences such as the one which was

imposed here is far in excess of self-imposed limits set by the courts in contempt proceedings. (Pet. pp. 26, 32, App. H.)

It is submitted that the issue here presents questions which loom large in the administration of justice in contempt proceedings in the federal courts and should be decided by this Court. In no other area, perhaps, is it so important that "decent and civilized" standard be prescribed by this Court.

IV.

The respondent has made no answer to Point IV of the petition (pp. 33-35).

Conclusion.

It now appears clear that the Court of Appeals has rendered a decision in conflict with the decision of other courts of appeals on the same matter, and has decided a federal question in conflict with applicable decisions of this Court. Moreover, the Court of Appeals has so far sanctioned such a departure from the accepted and usual course of summary contempt proceedings as to call for an exercise of this Court's power of supervision. The petition for certiorari should be granted.

Respectfully submitted,

BEN MARGOLIS,

Attorney for Petitioner.

Service of the within and receipt of a copy thereof is hereby admitted this.....day of January, A. D. 1956.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1956.

No. 15

OLETA O'CONNOR YATES,

Petitioner,

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit.

BRIEF FOR THE PETITIONER.

Opinions Below.

The opinion of the Court of Appeals [R. 42-48] is reported at 227 F. 2d 851. The opinions of the Court of Appeals (App. D, pp. 17-23; App. F, pp. 30-34)¹ in connected cases are 227 F. 2d 844 and 227 F. 2d 848. The opinions of the District Court in said cases (App. C, pp. 10-16; App. E, pp. 24-29) are reported in 107 Fed. Supp. 408 and 107 Fed. Supp. 412.²

¹The reference "App." is to the appendix attached to the petition for the writ of certiorari in the case herein.

²There were four related judgments and orders entered by the trial judge against this petitioner in different contempt proceedings arising solely out of petitioner's refusal to answer certain questions during her cross-examination in the Los Angeles Smith Act trial, *United States v. Yates, et al.* As the Court of Appeals indicated (App. F, p. 34, n. 5), determination of the questions here requires a consideration of the companion contempt proceedings and an appraisal of the proceedings in the criminal trial, now on review in this Court. *Yates, et al. v. United States*, Nos. 6, 7, 8. The details of these related proceedings are set forth hereafter in the Statement of the Case.

Jurisdiction.

The judgment of the Court of Appeals was entered on July 26, 1955 [R. 48]. Rehearing was denied on November 2, 1955 [R. 49]. The petition for a writ of certiorari herein was filed November 30, 1955, and was granted January 16, 1956 [R. 49], 350 U. S. 947. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented.

1. Whether refusal on the same grounds to answer a series of questions on the same subject and of the same character in the same trial in a single examination may be treated as separate contempts and separately punishable, in the light of the provisions of 18 U. S. C. 401, the Congressional policy behind the enactment of the said statute, the double jeopardy provisions and the due process provisions of the Fifth Amendment.

2. Whether the sentence of one year imprisonment for contempt of court was arbitrarily imposed and contrary to law, and so unnecessarily severe and grossly excessive as to constitute a manifest abuse of discretion, cruel and inhuman punishment, and a deprivation of petitioner's liberty without due process of law contrary to the interest of justice and in violation of the due process provisions of the Fifth Amendment and the provisions of the Eighth Amendment.

3. Whether the decision and judgment of the court below holding that the trial judge was empowered to impose a punitive punishment of imprisonment for one year in proceedings whose character and purpose were essentially coercive and remedial were contrary to law,

the provisions of 18 U. S. C. 401, and deprived petitioner of her liberty without due process of law in violation of the due process provisions of the Fifth Amendment.

4. Whether the imposition of the sentence of one year imprisonment by the trial judge on the unlawful, irrelevant and extraneous grounds that petitioner after trial and discharge of the jury continued in her refusal to answer the inquiries propounded during her cross-examination for the benefit of the prosecution in some possible future trial, deprived petitioner of her liberty without due process of law contrary to the due process provisions of the Fifth Amendment, and voided the sentence and judgment of contempt.

Statutes and Rules Involved.

The statute and rule involved read as follows:

APPENDIX G.

18 U. S. C., Section 401.

Power of Court.

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701.

FEDERAL RULES OF CRIMINAL PROCEDURE—RULE 42.
Criminal Contempt.

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

Statement of the Case.

A. The First Contempt Proceeding.

The contempt proceedings here arose out of unusual circumstances which require a detailed analysis in order to place the legal issues in proper focus. As the Court of Appeals stated: "Since proceedings in contempt are *sui generis*, here the whole course of action in the criminal trial and all the subsequent proceedings must be appraised" (App. F, p. 34, n. 5).

The petitioner was indicted together with thirteen other defendants on December 21, 1951, charged with a conspiracy (18 U. S. C. 371) to violate provisions of the Smith Act (18 U. S. C. 2385). Trial under this indictment commenced on or about February 1, 1952. The prosecution rested its affirmative case on May 21, 1952 [Tr. 8659].³

The object of the evidence offered by the prosecution on its direct case was to establish basically two propositions: the first, that the Communist Party advocated and taught the overthrow of the Government by force and violence; the second, that the defendants were members and officials of the Communist Party. Virtually half of the prosecution's case was made up of readings into the record of extensive excerpts from Marxist writings; the other half was made up of documentary and oral testimony which sought to establish that the defendants were long-time officers and members of the Party. Among

³The reference "Tr." is to the Reporter's Transcript of Proceedings in the criminal trial on file in this Court, Nos. 6, 7, 8.

the defendants so identified were Frank Spector, Al Richmond, Dorothy Healey, Ernest Fox and Albert Jason Lima. It is relevant to note that at no time during the trial did the said defendants, or their counsel, ever contest the evidence insofar as it purported to establish defendants' membership and officership in the Communist Party.

The prosecution witnesses also testified that they had heard members and subordinate officers of the Party make various statements at Party meetings or classes. Such third persons included, among others, Harry Glickson [Tr. 4443-45]; Leon Kaplan [Tr. 4481, 5440-44]; Ida Rothstein [Tr. 4424-26]; Herschel Alexander [Tr. 7617-27]; and Celeste Strack [Tr. 5519-20]. Again, at no time during the trial did the defendants, or their counsel, dispute the identification of the aforesaid persons as members and officers of the Communist Party.

When the prosecution's case was concluded, ten of the defendants rested their cause [Tr. 10,074-77]. These included the aforesaid Spector, Richmond, Healey, Fox and Lima. Among the four defendants who did not rest was the petitioner.

Petitioner limited her direct testimony to one issue: her own understanding of the principles and programs of the Party and the principles of Marxism-Leninism. She described her own activities in the Communist Party, how she had come to join the Party, and how she had reached her understanding of Marxist principles, and what that understanding was [Tr. 10,159-11,170]. At no time in her direct testimony did petitioner contradict in any way the identification by the prosecution witnesses of the aforementioned persons as members and officers of the Communist Party.

On her direct examination, during a discussion of the role of the State in Marxist theory, petitioner testified that she had witnessed or read of many acts of violence and terrorism against members of the Communist Party which had been left unpunished by officials of government and that she had drawn the conclusion that the policy of the Party with respect to keeping the names of its members confidential was often necessary, that "in order to protect the lives, the families, the jobs and the welfare of these people that there are many times and many people who cannot publicly announce their political affiliations however much they would like to do so" [Tr. 10,517].⁴

When petitioner had concluded her direct examination, she was then subjected to a lengthy cross-examination concerning her professed knowledge and understanding of the principles of Marxism-Leninism [Tr. 11,228-740, 11,853-72]. The record is clear that she answered all such questions on cross-examination fully and completely. Indeed, although the cross-examination was permitted to go beyond the matter of petitioner's own understanding and knowledge, petitioner answered all questions directed to her with the single exception discussed hereafter.

⁴See, for example, Ex. MG, March 31, 1948, "Gang Wrecks Ohio Communist Leader's Home" [Tr. 11,079]; Ex. MI, violence against alleged Communists at Peekskill, New York, at Paul Robeson concert [Tr. 11,080]; Ex. MJ, "Hiawatha 1950 Subversive," film shelved by movie studio because the "Indian chief was for peace" [Tr. 11,080]. See also, earlier evidence of physical and economic reprisals against alleged members of the Communist Party: Ex. JA, account of violence used by law enforcement agencies and vigilante groups against agricultural workers including alleged communists [Tr. 10,220-236]; Ex. JT, similar violence against maritime workers [Tr. 10,453-480]; petitioner's personal knowledge of the use by police officials of force against strikers and alleged communists [Tr. 10,469-74, 10,475-480]; Ex. LS [Tr. 10,504-517]; Exs. LU and LV [Tr. 10,517-520].

Thus, on the opening day of her cross-examination [June 26, 1952, Tr. 11,228, *et seq.*], petitioner was asked whether she knew the aforementioned Harry Glickson [Tr. 11,310]. She answered that she did know him, and had known him since the early 30's [Tr. 11,310]. Since the evidence offered by the prosecution identifying the said Glickson had not been disputed by petitioner and since petitioner conceded that she knew and had known the said Glickson since the early 30's, it appeared that the status of the said Glickson in the Party and petitioner's knowledge thereof was undisputably established. Nevertheless, on the opening day of the cross-examination, the prosecution insisted on further pressing the petitioner. Despite all the aforesaid, petitioner was asked successively if she had ever known Glickson to be a member of the Communist Party [Tr. 11,312]; if it was not true that Glickson during the years 1945 and 1946 had been an active chairman of a Communist club in San Francisco [Tr. 11,313], and if Glickson was in 1950 an active member of the Communist Party [Tr. 11,314]. A similar identifying question concerning the defendant Spector was also asked, the record being in a similar undisputed posture [Tr. 11,318-19].

The sole reason for petitioner's refusal to identify persons as members or officers of the Communist Party was avowedly one of conscience. No question of misbehavior or even rudeness or discourtesy is involved herein. There was no physical obstruction of the trial proceedings, and as has been aforesaid, there was not even any legal obstruction of the prosecution's case before the jury. Whenever she was asked throughout her cross-examination, petitioner always acknowledged that she knew the various persons aforesaid and stated how long she had

known them [Tr. 11,620, 11,621, 11,622, 11,633], and petitioner never disputed the identifying evidence offered by the prosecution. The only one who suffered because of the declination to answer was petitioner herself.⁵

In declining to answer the four questions which sought to compel petitioner to identify Glickson and Spector as members and officers of the Communist Party, petitioner made clear that her declination was based solely on her unwillingness to cause any person "the loss of his job, his income and perhaps be subjected to further harassment, and in a period of this character, where there is so much witch-hunting, so much anti-communism, I am sorry I cannot bring myself to contribute to that" [Tr. 11,312]. The petitioner added:

"However many times I am asked and in however many forms, to identify a person as a communist, I can't bring myself to do it, because I know it means loss of job, I know that it means persecution for them and their families, I know that it even opens them up to possible illegal violence, and I will not be responsible for that. I will not do it" [Tr. 11,315].

The District Court on this initial day of cross-examination understood that petitioner's refusal to answer was based solely on conscientious scruples. The trial court stated: "The witness does not want to be an informer" [Tr. 11,337]. "The jury undoubtedly under-

⁵We refer not only to petitioner's protracted incarceration in the various contempt proceedings, but to the principal trial. The prosecution's testimony on the issue here involved went uncontradicted throughout the Smith Act trial, and was not disputed in counsels' summations to the jury. Without objection, the trial court instructed the jury that "the fact that the defendant Yates refused to answer certain questions may be considered by the jury in determining the weight and credibility of her own testimony," 106 Fed. Supp. 906, 929.

stands what it is to be put under the obligation to inform on others. They may feel that they would do the same thing" [Tr. 11,337]. Nevertheless, the prosecution urged upon the trial court at the end of the first day of cross-examination a coercive order which would require petitioner to identify the said Glickson and Spector as Communists [Tr. 11,346-47]. The trial court then stated to petitioner: "The orders of the Court must be obeyed and the power of the Court must be vindicated regardless of what your feelings may be" [Tr. 11-368]. Petitioner was thereupon adjudged in contempt and committed to the custody of the United States Marshal "to be by him imprisoned in a jail type institution until you have purged yourself of your contempt by answering the questions ordered to be answered in each instance or until further order of the Court" [Tr. 11,372-373]. The court held that the petitioner had committed four separate offenses of contempt, but stated to petitioner: "To borrow language from some of the cases, you carry the key to your jail in your own purse. You may purge yourself at any time and be discharged from custody" [Tr. 11,373]. A formal judgment was entered the next day, June 27, 1952 [C. 27, p. 3].⁶

The petitioner was in this manner incarcerated on the first day of her cross-examination and remained jailed for the balance of the trial, a period of about 43 days. All consultations with counsel and preparations of her defense thereafter were necessarily held within the confines of the prison.

⁶In the Court of Appeals, the transcript of the record in this initial contempt proceeding was numbered 13527 and has been filed with this Court in order to facilitate the appraisal of the subsequent contempt proceedings arising out of the same subject matter. The reference to this transcript is "C. 27".

It is relevant to the questions here presented to follow this civil contempt proceeding to its conclusion. Petitioner was committed, as aforesaid, on June 26, 1952. The criminal trial was concluded on August 6, 1952. Sentence in the principal cause was imposed the next day. The trial court refused bail pending appeal to all defendants. It was necessary to appeal to the Court of Appeals, who remanded with directions to the trial court to fix bail. Again the trial court denied bail. Finally, on August 29, 1952, the Court of Appeals itself fixed bail at \$20,000.00 for each defendant pending appeal. On August 30, 1952, petitioner furnished the said bail before another judge, then sitting temporarily in the District Court, but the United States Marshal advised the said judge that he was holding petitioner pursuant to the judgment of civil contempt, and that he could not release petitioner without an order of the court. Petitioner was thereupon permitted to furnish the \$20,000.00 bail and ordered released upon her stipulation that she would appear before the trial judge on the question of the "civil contempt" [C. 27, p. 11].

On September 3, 1952, petitioner appeared before the trial judge. This was now about 30 days after the trial, and petitioner had previously been incarcerated about 65 days. The trial judge held that petitioner was still not entitled to her release under the judgment of contempt. In the view of the court, the Government as plaintiff in the concluded criminal trial was still

"entitled to the benefit of the old answers . . .
the purpose in civil contempt is to coerce the witness
. . . the purpose is to get her testimony . . .
the purpose of coercion is to compel the answer to
the question . . . the Government is a litigant

in the case, for whose benefit the coercive power of the court is exercised on the witness to compel the answers . . . the Court of Appeals may order a new trial . . . there are coercive powers to compel the witness to do what she should have done when she was on the witness stand . . . It isn't a punitive matter . . . as long as the proceedings are pending, and if there is any purpose to be gained by the testimony, by any litigant entitled to it, it seems to me that the power of the court continues. . . ." [C. 27, pp. 29-41].

These were the dominant views of the trial court throughout all the contempt proceedings.

Petitioner was "ordered back into physical custody of U. S. Marshal pursuant to order of June 26, 1952, *re* civil contempt" [C. 27, p. 12.⁷ On September 4, 1952, petitioner surrendered to the Marshal and was returned to jail. The next day, the Court of Appeals stayed execution of the surrender order, and directed petitioner's release on \$1,000.00 bail pending appeal [C. 27, pp. 47-8]. Petitioner furnished the said bail on September 6, 1952, and was released.⁸

The Court of Appeals reversed (App. D, pp. 17-23). 227 F. 2d 844. The court held that the contempt "order of June 26, 1952, was valid" (App. D, p. 20), but that "it was error to attempt to coerce this witness with testi-

⁷A written opinion was subsequently rendered by the trial court (App. C, pp. 10-16). 107 Fed. Supp. 408.

⁸The bail was furnished and petitioner released before another District Judge. Again she was ordered to appear before the trial judge, this time on September 8, 1952, to face another contempt proceeding arising out of the same subject matter. The reason for these "cat and mouse" tactics is made apparent in the discussion which follows here in the Statement of the Case.

fying before a jury which had been disbanded and could not be legally recalled" (App. D, p. 23). The viewpoint of the Court of Appeals, however, with respect to the nature of contempt proceedings in general and its position with respect to the successive contempt proceedings which followed the initial one of June 26, 1952, is exemplified by such statements in this opinion as "there is no essential dichotomy between 'civil' and 'criminal' contempt"; that "a fixed term or an indefinite one which might last longer seems to make no distinction of practical value to a prisoner"; that "even the unexpressed purpose of the judge to coerce or punish is no test"; that "if we become involved in the bog of signification of phrases, the clear way will be lost" (App. D, pp. 18-19). One judge concurred only in the result (App. D, p. 23).

B. The Second Contempt Proceeding.

The petitioner having been imprisoned for contempt of court at the conclusion of the first day of her cross-examination (June 26, 1952), the same cross-examination continued thereafter, uneventfully, until the third day of her cross-examination was reached (June 30, 1952). The tenor of the prosecution's examination of petitioner was a critical analysis of her knowledge and understanding of the principles of Marxism-Leninism, to which she had testified on direct examination. As the day's session was coming to a close, the trial judge remarked: "She has been under cross-examination, this is the third day, Mr. Neukom, I expect you to be somewhere near the conclusion of it" [Tr. 11,616]. The prosecutor replied that he anticipated "going the remainder of tomorrow" [Tr. 11,616]. The Court stated: "You are wasting time now" [Tr. 11,616]. Whereupon, the prosecutor brought the day's session to a close by again asking the petitioner to

identify the various other aforementioned persons as members and officers of the Communist Party. As previously noted, all of these persons were co-defendants who had rested or third party declarants, identified by prosecution witnesses, without dispute, as members and officers of the Party.

The same question in three different forms was asked concerning Kaplan [R. 3-5];⁹ the same question concerning Rothstein [R. 5-6]; Alexander [R. 6-8]; Richmond [R. 8-9]; Healey [R. 10]; Spector (the same person involved in the first contempt order of June 26, 1952; C. 27, pp. 6-7) [R. 10-11]; Fox [R. 11-12]; Lima [R. 12-13]; and Strack [R. 13-14]. Again, whenever asked, petitioner stated how long she had known such persons. She had known Kaplan for about seven years [R. 4]. She had known Ida Rothstein for about fifteen or sixteen years [R. 5]. She knew Alexander [R. 6]. She knew Strack for about eight years [R. 14]. Petitioner never disputed the testimony concerning any person's membership or officership in the Party.

The grounds of petitioner's refusal to identify the aforesaid persons as Communists were precisely the same as they had been on the initial day of cross-examination when she was incarcerated for contempt. She informed the trial judge that she was adhering to her original position, stating: "I am sorry I can't for the same reasons that I advanced last week" [Tr. 11,618]. She told the prosecutor: "This is again the same question, and if you ask it in 20 different forms, if the content is the same, my answer must be the same" [R. 5]. As the prosecutor continued with his list of names, petitioner constantly reiterated her

⁹The reference "R" is to the Transcript of Record on file in the cause herein.

original position [R. 7] until the trial court finally cut off her statements with the following remarks before the jury: "You have made several speeches and I will ask you to refrain from any further ones. You have said that over and over again. You are instructed to answer the question" [R. 7].

At the conclusion of the day's session and after the jury had been excused, the trial judge stated: "I expect to treat the contempt of the court committed by the defendant Yates in today's session as criminal contempt pursuant to Rule 42 (a). That is my present inclination, and deal with them independently as far as punishment is concerned" [Tr. 11,634]. By mutual consent, immediate action was deferred. Subsequently, and on June 8, 1952, during the trial, the trial judge filed an "Order, Judgment and Certificate of Criminal Contempt" [R. 3-18]. The order recites eleven specifications and includes only the refusals to answer on the third day of cross-examination (June 30, 1952) [R. 3-15].

The jury returned its verdict of guilt in the principal cause on August 6, 1952, and was discharged. All the defendants including petitioner were sentenced the next day to a term of five years imprisonment and a fine of \$10,000.00, the maximum permitted by law. On August 8, 1952, petitioner was brought before the trial judge for the purpose of determining what punishment should be imposed for failure to answer the eleven additional questions of June 30, 1952. Before imposing sentence, the trial judge stated, among other things: "I had hoped by this time that Mrs. Yates might be willing to purge herself; that she might be prompted to do so" [R. 27]; "Anyone can have an appreciation of the sportsmanlike spirit that might prompt a person not to wish to be an

informer" [R. 27]; "Nevertheless, as I view it, the court, in its discretion, might treat answers now to the questions as a vindication of judicial authority and treat it [the contempt] as purged" [R. 28]; "Now the Government was entitled on cross-examination to show, if they could, that that person whom Mrs. Yates impliedly said was a very foolish person was a friend of Mrs. Yates of long standing who had worked with her, whatever the proof would show. We do not know" [R. 32]¹⁰; "I think in offering to accept her answers now as a purge is a humane, merciful thing to do under the circumstances" [R. 36]; "If she at any time within 60 days, while I have the authority to modify this sentence under the Rules, wishes to purge herself, I will be inclined even at that late date to accept her submission to the authority of the court" [R. 37].

The sentence of the trial judge was imprisonment for one year for "each of the eleven separate contempts" [R. 17], the sentences on each count to run concurrently and to commence following petitioner's release from custody following execution of the five-year sentence of imprisonment [R. 17-18].

The Court of Appeals below affirmed this judgment. The Court stated: "These eleven questions each of which

¹⁰Mrs. Yates' testimony regarding her own understanding of the meaning of Marxism-Leninism had varied sharply from statements attributed to one of the third party declarants, Glickson. She, however, had testified on cross-examination that she had known Glickson for over twenty years [Tr. 11,310] and never disputed the testimony that Glickson was a member of the Party.

were propounded upon June 30, constitute incidents separate and distinct from the first four" [R. 44]. "The sentence was severe. Its control is not in our province" [R. 47].

C. The Third Contempt Proceeding.

To recapitulate: On June 26, 1952, on the first day of her cross-examination, petitioner declined to identify Glickson and Spector as members and officers of the Communist Party upon the sole ground that she herself could not make such identification of any person as a matter of conscience. She was thereupon adjudged in contempt of court and immediately incarcerated. On June 30, 1952, in the same cross-examination, she was asked to make the same identification again of Spector and other co-defendants and third party declarants whose membership and officership in the Party had been undisputedly established. She adhered to her original position and was again adjudged in contempt. On August 8, 1952, two days after the completion of the trial, she was sentenced to one year's imprisonment for the alleged contempt of June 30 as aforesaid. On September 3, 1952, about 30 days after the conclusion of the trial, she was ordered to remain in jail under the original contempt order of June 26. On September 6, 1952, following an order of the Court of Appeals granting bail and staying execution of the order pending appeal, petitioner furnished bail and was released [C. 27, pp. 47-8]. Petitioner, however, was not yet free. The trial judge wished to see her again on September 8, 1952.

On September 8, 1952, counsel for the respective parties, and petitioner, appeared before the trial judge. This was now more than thirty days after the conclusion of the trial. Petitioner learned for the first time that the trial judge proposed to punish her failure to answer the first four questions of June 26 as "criminal contempts." The trial judge stated before imposing sentence: "The Court invoked equitable powers to attempt to force you to answer at that time, Mrs. Yates, but that has apparently been unsuccessful. Do you wish to answer the questions at this time? . . . You could end it very simply, Mrs. Yates, by answering the questions" [C. 35, p. 50].¹¹

The sentence of the trial judge was now three years' imprisonment "for your refusal to answer the four questions concerning Harry Glickson and Frank Spector," the sentences to run concurrently [C. 35, p. 52]. The written opinion of the trial judge is reported in 107 F. Supp. 412 (App. E). Upon imposing sentence, the trial judge stated: "I may say, Mrs. Yates, before you leave the bar, that at any time during the period I have jurisdiction to do so, if you are disposed to purge yourself of this contempt and obey all lawful orders of the court, I will entertain a motion to modify any one, not only this sentence [three years], but any other of the sentences heretofore imposed in the other criminal contempt proceedings [one year] which is No. 22,379 on the records of this Court" [C. 35, p. 53]. To the protests of counsel, the trial judge replied that "in view of the indication the

¹¹The transcript of record in the Court of Appeals in this proceeding was numbered 13535 and is referred to here as "C. 35". The transcript has been filed with this Court, as was the transcript numbered 13527 aforesaid, to enable this Court to appraise these successive contempt proceedings in their entirety.

court has given, Mrs. Yates still has the keys to the jail in her own pocket" [C. 35, p. 55].¹²

Petitioner was returned to custody on September 8, 1952. The Court of Appeals ordered her release on her own recognizance pending appeal. She was released on September 11. Petitioner had now been confined for 70 days under the aforesaid contempt orders as aforesaid.

On November 12, 1952, the trial judge, having previously requested the Court of Appeals to remand the judgment for the said purpose, entered an "Order Supplementing 'Certificate, Order and Judgment on Contempt' *nunc pro tunc* as of September 8, 1952" [C. 35, pp. 63-4]. It was ordered that the provisions of the third contempt judgment be supplemented by the additional order that the three-year term of imprisonment follow upon petitioner's release from custody following execution of the five-year sentence, and run concurrently¹³ with the sen-

¹²The trial judge appeared determined after trial to keep petitioner in jail indefinitely as a means of overcoming her scruples and coercing her answers, despite all the indications from the appellate court in granting stays and bail pending appeal that substantial questions of law had arisen from the actions of the trial judge in the various contempt proceedings. Thus, prior to September 8, petitioner had been released on bail after trial pending her appeal from the judgment of conviction in the criminal trial; she had been released on bail pending appeal from the order directing her return to custody under the contempt judgment of June 26; the one year sentence of imprisonment for the alleged contempt of June 30 was to commence after the five year sentence on the Smith Act conviction had been served. Only after these events had transpired, when it appeared that petitioner was to be free pending appeal from all these various judgments and orders, did the trial judge impose a three year sentence of imprisonment for failure to answer the four questions propounded on the first day of cross-examination.

¹³This is another example of the trial judge's concept of the contempt power. When the three year sentence was originally imposed, the intention of the trial judge was to see petitioner immediately incarcerated [C. 50-5]. When this was frustrated by the stay pending appeal granted by the Court of Appeals, the trial judge amended his judgment to provide that the three year term of imprisonment follow execution of the five year sentence in the principal cause.

tence of one-year imprisonment under the second contempt judgment.¹⁴

The Court of Appeals reversed the three-year contempt judgment (App. F, pp. 30-4); 227 F. 2d 848. The Court stated: "This situation is complex. To overcome the refusal of the defendant in a criminal case to answer these four questions, the court had committed her. While upon the witness stand during this confinement, Mrs. Yates had refused to answer eleven other questions of a similar nature, and was thereupon sentenced to imprisonment for a year as a punishment. This conviction has been upheld. It was expressly decided there that the two occasions were separate and distinct and different corrective and punitive measures, were within the competence of the court" (App. F, p. 31). The Court of Appeals decided, however, that the three-year contempt judgment was invalid because "the notions inherent" in due process of law "will not permit, without prior positive notification, what otherwise might be viewed as the indefinite confinement of a defendant in a criminal case pending his submission as a witness to authority, and then, when imprisonment has had no effect, the punishment of the refusal of obedience by incarceration for a term of years" (App. F, p. 34).¹⁵

¹⁴It was further ordered:

"that if and when, at any time prior to the defendant's release from custody following execution of the concurrent three-year sentences of imprisonment here imposed, the defendant shall purge herself of contempt by answering under oath the questions as provided in the 'Judgment, Order and Commitment in Civil Contempt' entered June 26, 1952, in proceeding No. 14291—Civil in this court, and shall be declared so purged by order of this court in said proceeding numbered 14291, then the four concurrent three-year terms of imprisonment herein imposed shall *ipso facto* cease and terminate" [C. 35, p. 60].

¹⁵Had the court below adopted the view that the refusal to answer the eleven similar questions of June 30 was not a "separate and distinct" contempt from the alleged contempt of June 26, this reason for the reversal of the three year judgment would have equally required a reversal of the one year judgment.

Summary of Argument.

1. The rulings of the courts below are clearly contrary to the deliberate Congressional purpose drastically to curtail the range of conduct which courts may punish as a contempt. The *Peck* trial of 1831 which led to the enactment of the Contempt Act was intended, among other things, to do away with the vice of "double punishment" in contempt proceedings. The lower federal and state courts have, therefore, uniformly held that a court may not successively continue to punish as a contempt the continued adherence of a witness to a position originally stated and for which initial position sanctions have been applied. As this Court has indicated, the test should be—if grave questions of due process, double jeopardy and cruel and inhuman punishment are to be avoided—whether the conduct of the accused was motivated by only a single impulse, whether the thought, purpose and action of the witness were conjoined into a single attitude. Both in contempt cases and the ordinary criminal law, the courts have refused to punish as multiplied offenses the same conduct, act or transaction merely because they affected different persons or things. Nor are separate offenses committed when a witness in a single proceeding refuses to answer similar questions upon the same grounds, even if the single proceeding is continued for a few days. On the record herein, there was no contempt of the court's authority nor a disobedience of its orders within the intentment of 18 U. S. C. 401 when petitioner reiterated the conscientious scruples which led her initially to decline to answer the questions and for which she was immediately punished and confined.

2. A serious question exists in this case as to whether the trial judge was warranted at all in holding that peti-

tioner had committed a punishable contempt. This Court has constantly held that the characteristic upon which the power to punish for contempt must rest is an obstruction to the performance of judicial duty. The record does not reveal an obstruction to the administration of justice in the trial below. There was no disruption of the process of the trial or the court's decorum. The prosecution evidence which established that the specified persons were members and officers of the Communist Party was not disputed by petitioner, the other defendants or their counsel. No one was deceived or misled by petitioner's refusal to make the identification. The only consequence of petitioner's refusal to answer, in the light of the court's instructions, was to injure the effect of her entire testimony upon the jury and to increase the possibilities of conviction. There was simply no conduct of petitioner which obstructed justice here.

In fact, petitioner has been punished, not for a contempt of the authority of the court, but for adherence to a conscientious scruple which she could not forfeit. Petitioner stated that the sole ground for her refusal in essence was that she did not want to be an informer, that she could not identify a person as a member of the Communist Party when such identification might subject the person to economic, social and even physical reprisals. Clearly, this was a claim of conscience, and on this undisputed record, in no sense a flouting of the judge's authority. This Court has recognized that claims of conscience should be respected, especially when the claims of

the State are in no way impaired or denied. Law and history attest to the universal aversion and disdain with which informers are held. Petitioner did not want to do a mean and unworthy thing, and her refusal to be an informer in no way interfered with the administration of justice. Yet for this limited refusal, petitioner has been sentenced to imprisonment for one year in the name of contempt of court.

The consequence of the rulings of the courts below require the critical examination of this Court. If, despite an undisputed record as exists here, an accused in a Smith Act prosecution must sacrifice her conscience at the whim of the prosecutor and a hostile judge or else suffer imprisonment for contempt for seventy days, and then one year, in addition to the complete discrediting of her testimony, the present right of an accused to testify in her own defense (18 U. S. C. 3481) will be subverted. A serious failure of due process of law is presented in these contempt proceedings against petitioner.

These considerations bear importantly on the cruel and inhuman punishment which was imposed on petitioner here by the trial judge in a manifest abuse of discretion. As the *Peck* trial and the Congressional policy behind the Contempt Act reveal, the courts in contempt proceedings are not executing the criminal laws of the land. The power is to be exercised only when an obstruction to justice is plainly established, and the extent of the power is the least possible power adequate to the end proposed. An examination of the history of the Contempt Act, as

well as both state and federal precedents, shows that the trial judge here exceeded all bounds of judicial discretion in imposing the sentence of imprisonment for one year upon petitioner.

Moreover, the sentence of the court was based upon unlawful, irrelevant and extraneous factors. The grossly severe sentence was imposed upon petitioner, as the record plainly shows, because petitioner after trial still continued to decline to answer the questions posed during her cross-examination. After trial, however, petitioner could no longer answer or be compelled to answer, and her punishment for such post-trial refusals exceeded the contempt power of the trial judge, was illegal, and an abuse of discretion.

3. The punitive sentence was illegal for still another reason. The dominant purpose of all the contempt proceedings below was the coercion of petitioner's answers. Every penalty imposed upon petitioner was contingent upon her failure to answer the questions, a decisive characteristic of civil contempt. This Court has held that where the proceedings are essentially civil contempt proceedings, it is a fundamental error to impose punitive punishment therein. The trial judge here patently attempted to evade the exhaustion of his contempt power during trial by imposing successive punitive punishments after trial when the sole purpose of all the proceedings was the coercion of petitioner's answers. Such evasion cannot be countenanced if the drastically limited contempt power is not to become unfettered. The substance and not the form of the proceedings should govern, and the substance of the proceedings here was not criminal.

ARGUMENT.

I.

Petitioner's Statements During the Third Day of Her Cross-Examination That She Adhered to the Same Position Initially Expressed at the Outset of Petitioner's Cross-Examination Was Not a Punishable Contempt.

The power of the trial judge to punish petitioner for contempt of court allegedly committed on June 30, 1952, during the course of petitioner's cross-examination should be considered in the factual and legal setting here presented.

The cross-examination of petitioner began on June 26, 1952. She was asked by the prosecutor to identify two persons as members and officers of the Communist Party, an identification theretofore established by the prosecution and undisputed. Petitioner, in declining solely to make the identification, informed the prosecutor and the trial judge that "however many times I am asked and in however many forms, to identify a person as a communist, I can't bring myself to do it . . ." [Tr. 11,315]. This was the area delimited by petitioner, and upon this basis the prosecutor immediately called for a contempt order and upon this basis the trial judge acted [Tr. 11,337]. Thus, upon the aforesaid record, the trial judge exercised its professed power and jurisdiction to punish for contempt on June 26, 1952, and petitioner was incarcerated.

On June 30, while "still under cross-examination" [R. 44], petitioner was again asked to identify persons as members and officers of the Party, the posture of the undisputed record remaining the same. It was recognized by the courts below that the area of refusal was identical, that petitioner remained "adamant" in adhering to her

original position [R. 45-7]. As petitioner stated: "No. I am sorry I can't for the same reasons that I advanced last week" [R. 46]. The question presented is whether this continued adherence by petitioner to her original position was punishable as a contempt under 18 U. S. C. 401. The Court of Appeals below answered the question in the affirmative. It stated: "These eleven questions, each of which was propounded upon June 30, constitute incidents separate and distinct from the first four" [R. 44]. No reason was given for the conclusion thus reached.

Since a literal reading of 18 U. S. C. 401 and Rule 42(a) of the Federal Rules of Criminal Procedure provides no answer to the question posed in these proceedings, resort should be had to the history and Congressional purpose of the legislation. See, *United States v. Universal C. I. T. Credit Corp.*, 344 U. S. 218. Moreover, contempts are summary in their nature, and leave determination of their guilt to a judge rather than a jury, and the exercise by federal courts of such a broad power as was exercised here may readily permit inroads into safeguards of liberty afforded by the Constitution. Judicial power must therefore be considered in this constitutional setting. *Cammer v. United States*, 350 U. S. 399, 403-4. Other moral and judicial considerations, discussed hereafter, affect the determination of the issues and bear importantly on the administration of justice in the federal courts. See, *Offutt v. United States*, 348 U. S. 11.

On the record which is presented here, different conclusions as to the allowable "unit of prosecution" appear to have been reached by the courts below. The trial judge adopted the view that each refusal to obey the order of the court was a contempt of its authority and separately

punishable [C. 27, pp. 3-9; R. 3-15; C. 35, pp. 4-10]. The grounds of petitioner's refusal and their identical content were disregarded. The fact that the first three questions on June 26 were only different in form and dealt with the membership and officership of "Harry Glickson" in the Communist Party, was treated as of no consequence [C. 27, pp. 4-6]. The fact that the question concerning "Spector" on June 26 [C. 27, pp. 6-7] was repeated on June 30 [R. 10-11] with only slight variation was ignored. That three similar questions were put on June 30 concerning "Kaplan" [R. 3-5] was also treated as of no significance. The fact that the subject matter of all the questions was the same, the identification of persons as members and officers of the Communist Party, was unnoticed. Each refusal to answer, on the same ground, was in the trial judge's opinion a "contempt" of the authority of the court.

On the other hand, the Court of Appeals appeared to recognize at least that the subject matter of all the questions herein propounded during petitioner's cross-examination was essentially the same. In the ruling on petitioner's three-year sentence, the Court of Appeals, discussing the prior proceedings, stated: "While upon the witness stand during this confinement, Mrs. Yates had refused to answer eleven other questions of *a similar nature*, and was thereupon sentenced for a year as punishment" (App. F, p. 31) (emphasis supplied). Disregarding this factor, and all other factors aforementioned, the Court of Appeals held that the sentence of a year imprisonment was proper because "those eleven questions, each of which was propounded upon June 30, constitute incidents separate and distinct from the first four" [R. 44]. In view of the record, the only conclusion to be drawn from this state-

ment is that the Court of Appeals considered each day of the same cross-examination as a separate proceeding, and that refusals to answer on the third day of cross-examination were therefore "incidents, separate and distinct" from the refusals to answer on the first day of cross-examination, although the grounds of refusal were identical.

It is thus evident that both of the courts below disregarded the position of the accused, the singleness of her attitude, and the identical nature of the grounds of her refusal to answer the questions propounded on cross-examination. The power of the court successively to punish for contempt, with unbridled severity, was made commensurate with the whim of the prosecutor in the repetition of questions which the prosecutor and the court knew would each time elicit the same "conduct." If the Court of Appeals adopted a more restricted view, and this is by no means clear from the opinion, it was only to hold that the prosecutor might appropriately bunch the "similar questions" for different days of the single examination to reach the same result.¹⁶

It is clear from all the aforesaid that if continued adherence by a witness to an initial position advanced for

¹⁶The United States, in opposition to the grant of certiorari, took the position that the power to punish for contempt was to be measured by the number of "different" persons involved in the questions and the fact that the questions were not asked on "the same day" (Br., pp. 11-12). The United States construed petitioner's stated grounds for refusal to answer on June 26 as a "blanket advance declaration of her intention not to be cooperative" which could "hardly preclude separate convictions for refusals to answer specific questions concerning the activities and status of her various co-conspirators in the Communist Party" (Br., p. 11). It was conceded that petitioner's arguments "would have some weight" if the purpose of the series of questions put to petitioner had been "whether petitioner knew any Communists at all" (Br., p. 14).

declining to answer a question can be treated as successive punishable contempts whenever an interrogator puts questions which will necessarily elicit the same response, then the drastic power to punish for contempt will be widely extended.

If legislative intent and Congressional policy in the enactment of 18 U. S. C. 401 are significant factors in the determination of the issue here, it would appear that the courts below have disregarded history and precedent to obtain an unfettered power which the judiciary for more than a century has steadfastly declined to assume in the interests of justice and the appearance of justice. The opportunities for oppression are so manifest, if the views of the courts below are adopted, as to vividly recall the events which led to the enactment of the present contempt statute.¹⁷

The Contempt Act of March 2, 1831 (4 Stat. 487), from which the present statute is derived, has an unambiguous history. It was enacted on March 2, 1831, the High Court of Impeachment in the case of *United States v. James H. Peck* having rendered its judgment only one month earlier. Stansbury, *Report of the Trial of James H. Peck, Judge of the United States District*

¹⁷In opposition to certiorari, the United States argued that the argument of oppression raised by the petition for the writ could be "put aside" (Br., p. 14) because petitioner was not sentenced for life, her sentences on the separate counts being made to run concurrently (Br., pp. 14-15). The inference that it would be time enough for this Court to act when some "oppressive" situation was presented is repelled by the circumstances herein. Because of the trial judge's view as to the "separateness" of the offenses, the punishment imposed vaulted from 70 days to 1 year to 3 years. Moreover, the prison sentences were ordered served after the execution of the 5-year sentence in the principal cause. This may not in its entirety amount to a "life sentence" for petitioner, but it is clear that the issue of oppression is not entirely academic in this case.

Court (1833), p. 474. Thus, the prophecy of Mr. Buchanan, made during the proceedings, was quickly made concrete: "I will venture to predict, that whatever may be the decision of the Senate upon this impeachment, Judge Peck has been the last man in the United States to exercise this power, and Mr. Lawless has been its last victim." (*Id.*, p. 430.) It is impossible to read the record of the *Peck* proceedings without sensing the indignation of the legislators against the exercise of this "despotic power" (*id.*, p. 295), this "double punishment" (*id.*, p. 467) against the victim of Judge Peck's ire.¹⁸ The trial record is replete with references (*id.*, pp. 295-6, 311-12) to the decision of the Court in *Anderson v. Dunn*, 6 Wheat. 204, stressing that the extent of the exercise of the contempt power is "the least possible power adequate to the end proposed" (p. 230).

This Court has never failed to give due deference to the will of the legislators with reference to the Contempt Act. "But the power has been limited and defined by the Act of Congress of March 2d, 1831." *Ex Parte Robinson*, 19 Wall. 505, 510. "That it [the contempt power] may be regulated within limits not precisely defined may not be doubted." *Michaelson v. United States*, 266 U. S. 42, 66. "The Act . . . represented a deliberate Congressional purpose drastically to curtail the range of conduct which Courts could punish as contempt." *In re Michael*, 326 U. S. 224, 227. "In *Nye v. United States* . . . we reviewed the history of the 1831 Act and found that its purpose was greatly to limit the contempt power of federal courts . . . We consider the judicial power

¹⁸The sentence for contempt was 1 day imprisonment and suspension from practice for eighteen months (*id.*, p. 52).

in that same setting." *Cammer v. United States*, 350 U. S. 399, 403-4.¹⁹

In the light of the history of the Act and the consistent rulings of this Court, the lower federal courts have uniformly held that the multiplication of contempt offenses is inconsistent with the legislative policy which led to the enactment of the statute and the judicial policy which administers it. The courts have recognized that no issue of the power of a court to punish as a contempt the wilful refusal of a witness to testify or give evidence is involved in such a situation; the armory of sanctions is not curtailed. All that is involved is whether the court may successively continue to punish as a contempt the continued adherence of the witness to a position originally stated and for which sanctions have been presumably applied, if the original refusal was a contempt at all. Sensing that all attempts to create multiplied "contempts" by varying the questions in form, by dividing the essentially single proceeding into hours, days, or months, or by related variations on the same theme are merely methods of dividing up a single offense and extending the power of a judge beyond its ordinary limits, the courts here constantly refused to sanction such departures from the norm. Since "justice must satisfy the appearance of justice" (*Offutt v. United States*, 348 U. S. 11, 14), the federal courts have refused to approve a course of action which can lead to an intolerable arrogation of unfettered power and possibility of abuse which the Contempt Act was

¹⁹"And it is the clear teaching of the *Nye* and *Michael* cases that the grant of summary contempt power, as contained in 18 U. S. C. Section 401, is to be grudgingly construed, so that the instances where there is no right to a jury trial will be narrowly restricted to the bedrock cases. . . ." *Farese v. United States*, 209 F. 2d 312, 315 (C. A. 1, 1954). Cf., *In re Oliver*, 333 U. S. 257; *Offutt v. United States*, 348 U. S. 11; *In re Murcheson*, 349 U. S. 133.

intended to avoid. Since the issue is one of the exercise of judicial power, the courts have been particularly concerned to maintain the judicial restraint so essential in the administration of public justice. *United States v. Orman*, 207 F. 2d 148, 160 (C. A. 3, 1953); *United States v. Costello*, 198 F. 2d 200, 204 (C. A. 2, 1952); *United States v. Kamin*, 135 Fed. Supp. 382, 384 (D. C. Mass., 1955); *United States v. Emspak*, 95 Fed. Supp. 1012, 1014 (D. C., 1951); *United States v. Yukio Abe*, 95 Fed. Supp. 991, 992 (D. C. Haw., 1950). The state court rulings have followed the same pattern. *Fawick Cunflex Co. v. United Electrical, R. & M. Wkrs.*, 92 N. E. 2d 431, 436 (Ohio, App., 1950); *People v. Amorante*, 104 N. Y. S. 2d 807 (N. Y. App. Div., 2d Dept., 1951), 100 N. Y. S. 2d 677, 681 (N. Y. S. Ct., Sp. Term, 1950), 100 N. Y. S. 2d 463 (N. Y. S. Ct., Sp. Term, 1950); *Maxwell v. Rives*, 11 Nev. 213, 221 (1876).

The rationale of the aforesaid decisions is of particular significance. Thus, in *Costello*, the witness, after refusing to give any further testimony, was pressed to answer whether he had had a meeting with one person, whether he was familiar with the testimony of another person, and whether he knew still two other named persons. The Court stated (p. 204):

"But when the defendant made his position clear, the Committee could not multiply the contempt, and the punishment, by continuing to ask him questions each time eliciting the same answer; his refusal to give *any* testimony. In other words, the contempt was total when he stated that he would not testify, and the refusal to answer specific questions can not be considered as anything more than expressions of his intention to adhere to his earlier statement and as such were not separately punishable."

In *Orman*, the appellate court stated that the trial court "exhausted its sentencing power" (p. 160) after the initial punishment for contempt. In *Maxwell v. Rives*, the Court stated (p. 221):

"The statute concerning contempts is a penal statute and must be strictly construed in favor of those accused of violating its prohibitions. Upon that principle at least, if not upon more liberal principles of construction, the mere refusal of a witness to testify on the same issue cannot be deemed more than one contempt, no matter how many questions he may refuse to answer. Otherwise, there would be no limit to the amount in which he might be fined."

See also: *Lawson and Trumbo v. United States*, 176 F. 2d 49, 51 (C. A. D. C., 1949); *McGovern v. United States*, 280 Fed. 73 (C. A. 7, 1922); *State ex rel Parker v. Mouser*, 208 La. 1093, 1104, 24 So. 2d 151, 155 (1945); *Gantreaux v. Gantreaux*, 220 La. 564, 574, 57 So. 2d 188, 191 (1952); *State ex rel. Schoenhausen v. King*, 47 La. Ann. 701, 17 So. 288 (1895).

If the Contempt Act is construed as authorizing double or multiple punishments in situations such as is presented here significant constitutional questions involving due process, double jeopardy and cruel and inhuman punishment are immediately presented. Cf., *Ex parte Lange*, 18 Wall. 163, 173; *In re Bradley*, 318 U. S. 50; *Pennsylvania v. Nelson*, 350 U. S. 497, 509; Note, *Double Jeopardy Clauses* in 65 Yale L. J. 339, 363 (1956); Grant, *Lanza Rule of Successive Prosecutions* in 32 Col. L. Rev. 1309 (1932); Note, *The Identity of Criminal Offenses*, 20 Harv. L. Rev. 642 (1907); Comment, 37 Harv. L. Rev. 912 (1924); Note, *Double Jeopardy and the Concept of Identity of Offenses* in 7 Brooklyn L. Rev. 79

(1937); Note, 29 *Chicago-Kent L. Rev.* 348 (1951). Ordinarily, a construction of a statute which leads to grave constitutional questions will be avoided where another valid construction is available. *United States v. C. I. O.*, 335 U. S. 106, 121. Moreover, when this Court construes "statutes defining conduct which entail stigma and penalties and prison," particular emphasis must be placed on the policy which led to the enactment of the statutes. *United States v. Universal C. I. T. Credit Corp.*, 344 U. S. 218, 221. The trend of this Court's decisions, therefore, even in the more confined area of the ordinary criminal law is away from "harsher alternatives" where law and policy dictate a less onerous result. *Id.*, p. 222.

The *Universal* decision aforesaid is of importance here. There the prosecutor contended that each breach of the statutory duty under Section 15 of the Fair Labor Standards Act owed to each employee was a separate offense. The provisions of the law involved minimum wages, overtime, and record-keeping provisions of the Act. Because of the history and language of the statute, this Court rejected the prosecution's construction of the law. It was held that the statute punishes as one offense "a course of conduct"; "treats as one offense all violations that arise from that singleness of thought, purpose or action which may be deemed a 'single impulse'." *Id.*, p. 224. If the position of the accused, the "managerial decision," remained the same, the offense was single no matter how many underpayments were made and no matter how many employees were so underpaid. *Id.*, p. 224. Only a "wholly distinct managerial decision," involving a different course of conduct, would constitute a different offense. *Id.*, p. 225.

In the instant case, the clear history and policy of the Contempt Act is "drastically" to curtail the power of the trial judges to punish for contempt. The trial judge can punish for contempt only if he certifies that he saw or heard "the conduct" constituting the contempt. Rule 42(a). Clearly there can be no dispute that the conduct of the accused was motivated by only a "single impulse," that "thought, purpose and action" were conjoined into one single attitude, a refusal to identify persons as members and officers of the Communist Party [R. 45-47]. It was certainly not a contempt of the "court's authority" nor a "disobedience" of the "lawful orders" of the trial judge for the witness to reiterate the conscientious scruples which led her to decline initially to answer the questions for which she was punished and confined.²⁰

On this record, no support can be found, therefore, for the trial judge's ruling that each refusal of the petitioner to answer on June 30 during the third day of her cross-examination was a separate contempt of the court's authority and separately punishable. The decisions aforesated are all to the contrary. The suggestion of the United States in opposition to certiorari that the offenses could be multiplied by inquiring about the "status" of different persons is equally without merit. In the first place, the record belies the argument. On June 26, the prosecutor, despite the undisputed posture of the case, pressed the

²⁰It has been urged that "the refusal to answer one or many, related or unrelated, questions asked at one proceeding should warrant punishment for but a single contempt because of the singleness of the attitude displayed rather than because of any similarity in the line of interrogation." *Note*, 29 Chicago-Kent L. Rev. 348, 351 (1951). Here the questions were all related, the subject matter being the same—the identification of persons as members and officers of the Communist Party. Here the refusals were all related as well, the subject matter being the same—the refusal to identify persons as members and officers of the Party.

petitioner to answer whether a co-defendant who had rested and a third party declarant were members and officers of the Party. Petitioner answered, and the prosecutor knew, that "however many times I am asked and in however many forms, to identify a person as a communist, I can't bring myself to do it" [Tr. 11,315]. Nevertheless, the prosecutor in the same cross-examination pressed the petitioner to identify four more co-defendants and four more third party declarants as members and officers of the Party, again on an undisputed record and again knowing full well that the same position would be adhered to by petitioner. To hold that "separate offenses" were thus committed by the petitioner requiring separate punishments to successively "vindicate the authority of the court" is to ignore the plain record and to convert a single course of conduct into an infinite number of offenses at the whim of the prosecutor and court. Such procedure enables a judge who has initially felt himself affronted to continue to harass the witness (Cf., *Offutt v. United States*, 348 U. S. 11; *Cooke v. United States*, 267 U. S. 517) and a prosecutor to use a lever of coercion which would dissuade all but the hardiest defendant from taking the stand in his own behalf (Cf., *In re Snow*, 120 U. S. 274, 282; *In re Nielsen*, 131 U. S. 176, 187).

In the second place, the decisions abound that the same transaction or conduct cannot be turned into separate offenses merely because more than one person or thing is involved. As we have shown, in *United States v. Costello*, 198 F. 2d 200 (C. A. 2, 1952), the legislative committee continued to ask the witness whether he was familiar with the testimony given by "Francis McLaughlin"; whether he had met with "William O'Dwyer"; whether he knew "James Moran"; and whether he knew "Frank Bals"

(pp. 203-4)—after the witness had stated that he would not testify until he felt well enough to do so (p. 203). The Court held that the Committee “could not multiply the contempt” after the accused “made his position clear” (p. 204). It should be noted that in *Costello* the area of refusal was entire. In this case, the area was restricted by the petitioner to only one matter in her entire testimony, and this matter was undisputed on the record. Far less reason existed for holding that petitioner had committed the successive offenses of contempt than appeared in *Costello*. The *Costello* decision also serves as a reminder of the dangerous power which would be vested not only in prosecutors and judges, but in all legislative and administrative interrogating bodies if the rulings of the courts below are upheld.

Moreover, the test of “different” persons or things in situations involving the same conduct or transaction has seldom been adopted in the ordinary criminal law. We stress this aspect because at least in the criminal law, no matter how onerous may be successive prosecutions and punishments, some fixed limitation is usually provided as to the term of imprisonment and extent of the fines. Here fine and imprisonment find their limitations in the less ascertainable standards of “gross abuse of discretion” and “cruel and inhuman punishment.” The following decisions indicate the trend of the criminal law: *Bell v. United States*, 349 U. S. 81 (transportation of two different women — Mann Act violation — single offense); *Lockhart v. United States*, 136 F. 2d 122 (C. A. 6, 1943) (two persons put in jeopardy during bank robbery—single offense); *Dimenza v. Johnston*, 130 F. 2d 465 (C. A. 9, 1942) (three persons put in jeopardy during bank robbery—single offense); *Smith v. United States*, 211 F. 2d 957.

(C. A. 6, 1954) (theft of two letters from mail—single offense); *Robinson v. United States*, 143 F. 2d 276 (C. A. 10, 1944) (transportation of three women—Mann Act violation—single offense); *Colson v. Johnston*, 35 Fed. Supp. 317 (D.C. N.D. Calif., 1940) (robbery of nine mail pouches—single offense); *People v. Allington*, 103 Cal. App. 2d Supp. 911; 229 P. 2d 495 (two lewd acts under vagrancy charge—single offense); *State v. Hoffman*, 78 Ariz. 319, 279 P. 2d 898 (fraudulent sale of different assets—single offense).

The alternative position of the court below and the United States in opposition to certiorari—that each day of the same cross-examination was a separate proceeding and the events of each day therefore “distinct”—is also without validity. The cross-examination of petitioner was a single proceeding or occasion and no less so because the exigencies of time and court procedure enabled the prosecutor to lengthen the examination beyond the duration of a day. To make the exercise of the contempt power dependent upon the length of a prosecutor’s cross-examination is to set off on uncharted seas. Moreover, the trial judge instructed the jury (106 Fed. Supp. 929) that an accused who takes the stand in a criminal case waives the right to refuse to answer questions. If this be so, it is doubtful that the United States will argue that this waiver existed only for the first day of cross-examination and could be withdrawn on the third day of the same examination. If each day of the cross-examination be a separate proceeding, the waiver of the privilege in the first proceeding would not require a waiver in the third. 58 Am. Jur., *Witnesses*, Sec. 99, p. 82. In *Ulmer v. United States*, 219 Fed. 641, 647 (C. A. 6, 1915), the charge was perjury by the accused during his

examination concerning the affairs of a bankrupt. The Court stated:

"One item of false testimony, constituting a crime, is not multiplied into several crimes because an answer is repeated as many times as the question is asked, nor because the answer is varied in form to meet the modified shape of the inquiry; nor can it be important whether an intervening recess is of a few minutes or a few days, so long as the continuity of the testimony is not broken."²¹

It is submitted, therefore, that the trial judge exceeded his power and jurisdiction in entering the judgment of conviction of June 30, and that the court below erred in affirming the one-year sentence of imprisonment. Under the circumstances herein, such judgment and sentence deprive petitioner of her liberty without due process of law, place petitioner twice in jeopardy for the same offense and constitute thereby cruel and inhuman punishment. The exercise of the contempt power here was extended beyond its lawful limits. The judgment should be reversed, it is submitted, in the interest of justice and as a matter of law.

²¹The United States in opposition to certiorari pointed to *Costello* where the accused was punished separately for his refusal to testify on two different days before the legislative committee. Aside from the difference in the proceedings and examination of witnesses in legislative inquiries and a cross-examination during a criminal trial, it should be noted that Costello himself made the supporting grounds of his refusal separate on each day. On the first day, he produced a doctor's certificate which the Committee rejected (p. 203). On the second day, the same doctor testified that Costello could testify for an hour a day (p. 203). Costello then produced another certificate from his regular physician stating that sustained conversations by Costello would be dangerous to his health (p. 203), and this second certificate from the second physician was again rejected. *Costello* was not decided on the basis of a mere dichotomy in days; it was decided on the basis of the different conduct of the accused in the various committee hearings.

II.

The Sentence of One Year Imprisonment Was Arbitrarily Imposed and Contrary to Law and Constituted a Gross Abuse of Discretion and Cruel and Inhuman Punishment in Violation of the Policy of the Contempt Act and the Due Process Provisions of the Fifth Amendment and the Provisions of the Eighth Amendment.

1. **The Judgment and Sentence Imposed Upon Petitioner for the Alleged Contempt Was Arbitrary and Unwarranted and Contrary to Law.**

A. The question as to whether the trial judge was warranted at all in holding that petitioner had committed a punishable contempt bears importantly on the issue of the cruelty of the sentence. We treat this question first, therefore, and divide the initial discussion into two categories, legal and factual.

As to the legal phase, it is important to note at the outset that we deal with the exercise of a summary contempt power which in the light of history and Congressional policy has been progressively limited. As the contempt power was first embodied in the Judiciary Act of 1789; as it was then succeeded by the Act of March 2, 1831, following Judge Peck's trial; as it later became Section 268 of the Judicial Code; and now 18 U. S. C. 401, 402, restrictions upon the power of the courts became more stringent. *Matusow v. United States*, 229 F. 2d 335, 339 (C. A. 5, 1956). "The pith of this rather extraordinary power to punish without the formalities required by the Bill of Rights for the prosecution of federal crimes generally, is that the necessities of the administration of justice require such summary dealing with obstructions to it. It is a mode of vindicating the majesty of

law, in its active manifestation, against obstruction and outrage." *Offutt v. United States*, 348 U. S. 11, 14.

This Court has stated that the recognition of a power to summarily punish for contempt "expresses no purpose to exempt judicial authority from constitutional limitations, since its great and only purpose is to secure judicial authority from obstruction in the performance of its duties to the end that means appropriate for the preservation and enforcement of the Constitution may be secured." *Ex parte Hudgings*, 249 U. S. 378, 383. Therefore, this Court added in the same case: "*An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest*" (p. 383) (emphasis supplied). The "presence of that element must be clearly shown in every case where the power to punish for contempt is exerted" (p. 383). If the element of obstruction be clearly present, it is immaterial that the conduct manifested itself in perjurious statements, refusal to testify or physical disturbance. Cf., *Clark v. United States*, 289 U. S. 1. If, however, the conduct, whatever its form, did not "obstruct or halt the judicial process" (*In re Michael*, 326 U. S. 224, 227), then such conduct does not justify exertion of the contempt power. In each case, the Court must examine the facts to determine whether the "essential characteristic" of obstruction is plainly present, not leaving the matter to presumption nor attributing without proof "a necessarily inherent obstructive effect" to the conduct of the accused. *Ex Parte Hudgings, supra*, p. 384. If this fundamental rule be not observed "then the conditions which Congress sought to alleviate in 1831 have largely been restored." *Nye v. United States*, 313 U. S. 33, 49.

As to the factual phase of the matter, there is serious doubt on the record here that petitioner's refusal to identify the named persons as members or officers of the Communist Party amounted to an obstruction to the administration of justice in the trial court. There was no insolence or disrespect to the trial judge, no overt misbehavior which disrupted the process of the trial or the court's decorum. Petitioner stated initially to the trial judge that there was no intent on her part to show any disrespect for the court or for the rulings of the court or for the power or authority of the court. "I stated what I did state because in all conscience I cannot do otherwise. . . ." [Tr. 11,367]. The trial judge recognized that this was the only reason the petitioner declined to answer [Tr. 11,337; R. 27].

There was no delay in the trial because of petitioner's limited refusal, and the trial was concluded with a verdict of guilty as to all the accused. The prosecution had established by extended evidence that the named persons were members and officers of the Communist Party. The trial court so held on motions to strike evidence and for acquittal at the conclusion of the prosecution's case. 106 Fed. Supp. 892, 900; 106 Fed. Supp. 906, 922. "The evidence establishes *without dispute* that the defendants were members and officers or functionaries of varying degrees of standing and activity in the Communist Party during the period covered by the indictment." *Id.*, p. 922. (Emphasis supplied.) So far, therefore, as the prosecution's case before the jury was concerned, the subject matter was indisputably established.

The petitioner at the outset of her cross-examination stated: "I am quite prepared to discuss anything that I did, anything that I said" [Tr. 11,234]. There is no

question that she answered every question posed by the prosecutor fully and at length, except the questions involved here. At no point did she dispute the prosecution's evidence concerning the membership of the named persons in the Communist Party. More than this, so that the prosecution obtained the fullest advantage, whenever she was asked petitioner stated how long she had known the specified persons.

Again, before the jury, the prosecution was able to argue without dispute that the evidence established without denial that the third party declarants and defendants were members and officers of the Communist Party. Cf., *Baker v. United States*, 118 F. 2d 533, 544 (C. A. 8, 1940). Counsel for defendants in their summation to the jury left this issue untouched. And, to make certain that the jury would reach the inevitable conclusion, the trial judge instructed them that "the fact that the defendant Yates refused to answer certain questions may be considered by the jury in determining the weight and credibility of her own testimony." 106 Fed. Supp. 906, 929.

What was the principal issue at the criminal trial? It was not whether the defendants were members and officers of the Communist Party. The Communist Party was not the conspiracy charged in the indictment, as the trial judge instructed the jury. 106 Fed. Supp. 934. The fact that a third party declarant was a member or officer of the Communist Party when he made some statement was not binding on the Party, or defendants, as the trial court instructed the jury. 106 Fed. Supp. 936, 937. The principal issue at the trial was whether the defendants had conspired to advocate and teach the overthrow of the Government by force and violence (106

Fed. Supp. 933), and whether the third party declarants were members of such conspiracy (106 Fed. Supp. 936-37).

At most, therefore, the issue as to the membership and officership of these named co-defendants and third party declarants was a subsidiary one. Yet in no way was the determination of this issue "obstructed" or blocked by this petitioner. The only result of her refusal to make the identification was to injure the effect of her entire testimony upon the jury without otherwise being of consequence. No one was deceived or misled by petitioner's refusal to answer. In short, there was no misconduct obstructing justice here, and the court was unjustified, it is submitted, in treating petitioner's position as a contempt of court. See, *United States v. Goldstein*, 158 F. 2d 916, 920 (C. A. 7, 1947); *In re Gottman*, 118 F. 2d 425 (C. A. 2, 1941).

B. In fact, petitioner has been punished here not for a contempt of the authority of the court, but for adherence to a conscientious scruple which she could not forfeit. That is all the record here establishes, devoid of baseless conjectures and surmisals which a court of law cannot entertain. See, *Stack v. Boyle*, 342 U. S. 1, 5-6. All that petitioner stated was that she did not want to be an informer, that she was unwilling to cause any person the loss of his job, his income, and to subject such person to harassment and ostracism at a time when such results might inevitably flow. See the opinion of Justice Douglas in *Ullmann v. United States*, 350 U. S. 422, 440. "The disclosure that a person is a Communist practically excommunicates him from society." *Id.*, p. 453. See also, *Black v. Cutter Laboratories*, 351 U. S., 100 L. Ed. (Adv. Ops.) 681. It is not that petitioner paid no pen-

alty for the judgment which her conscience led her to make. Her entire defense was discredited before the jury by the instructions of the trial judge, and her conviction under a serious charge was facilitated by her own position. Was the additional grossly severe penalty of contempt warranted under such circumstances?

This Court has recognized that coercion and suppression of conscience are never fruitful, that they lead only to resistance and martyrdom and ultimately to a granting of the right. This because all men have recognized ultimately that coercive violence applied "to force conscience is worse than cruelly to kill a man." Sebastian Castellio, follower of Erasmus, quoted in 1 Stokes, *Church and State in the United States*, p. 101. Indeed, man is unable, with honesty, to change his conscience by force or violence or fear alone and without voluntary acceptance. Conscience is not amenable to command. "For . . . there is in our consciences an unwritten, unchanging law 'from which we cannot be set free even by the Senate or by the people.'" Le Clerc, *The Two Sovereignities*, p. 4. A pervasive recognition of these truths appears in the decisions of this Court. *Girouard v. United States*, 328 U. S. 61; *Cantwell v. Connecticut*, 310 U. S. 296; *United States v. Ballard*, 322 U. S. 78; *West Va. State Board of Education v. Barnette*, 319 U. S. 624.

The petitioner could not bring herself to be an "informer," to identify persons as members or officers of the Communist Party. She did not want such persons to be subjected to economic sanctions, to ostracism and perhaps to physical violence. Clearly, this was a claim of conscience, and its expression in no sense a flouting of the trial judge's authority. "Nearly three centuries

ago, an obscure Englishman named Francis Jenkes was haled before Charles II and his Council for presuming to criticize royal policies at a public meeting. After he had frankly admitted his speech, the King asked him, 'Who advised you in this matter?' Jenkes replied—"To name any particular person (if there were such) would be a mean and unworthy thing, therefore I desire to be excused all farther answer to such question." But because of his silence he stayed all summer in prison, and his stubbornness helped bring about the great Habeas Corpus Act of 1679. Chafee, *Thirty-Five Years With Freedom of Speech* in 1 Univ. of Kansas L. Rev. 1, 29 (1952). It is this "mean and unworthy thing" which petitioner alone refused to do. For her refusal she has been punished in the name of "contempt of court."

Yet petitioner's scruples were neither frivolous nor novel. The aversion to informers, the disdain for tale-bearers permeates not only the modern scene, but the multifold historical areas of the past. The courts themselves have exhibited this revulsion toward this unworthy class of persons. *District of Columbia v. Clawans*, 300 U. S. 617, 630; *American Communications Association v. Douds*, 339 U. S. 382, 447, opinion of Justice Black; *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 180, opinion of Justice Douglas; *Peters v. Hobby*, 349 U. S. 331, 351, opinion of Justice Douglas; *Fletcher v. United States*, 158 F. 2d 321, 322 (C.A. D.C., 1946); *Parker v. Lester*, 227 F. 2d 708, 716-724 (C. A. 9, 1955); *Fisher v. United States*, 231 F. 2d 99, 106 (C. A. 9, 1956); *Colyer v. Steffington*, 265 Fed. 17, 25-26 (D. C. D. Mass., 1920); *United States v. Beck*, 138 Fed. Supp. 756, 758 (D. C. Texas, 1956); *United States v. Tijerira*, 138 Fed. Supp. 759, 760 (D. C. Texas, 1956).

Indeed, the cult of the "informer" has become a matter of national concern. More and more it has come to be realized that it is a "dirty business," a "distasteful occupation and one that does not become well a free society. . . . The informer smacks of the police state; and we think that most Americans instinctively shrink from its use." *Editorial*, New York Times, July 8, 1954. The widespread condemnation of informers indicates that they are not the sort of individuals whom responsible people respect. The informer is not an honored member of the community; he is the personification of the traducer, the liar, the rumor monger, the person who sets the community in dissolution "where each man begins to eye his neighbor as a possible enemy. . . ." *Address by Judge Learned Hand*, 86th Convocation of the University of the State of New York, October 24, 1952, at Albany, New York. See also, Chafee, *Free Speech in the United States* (1941), pp. 215-218, 277-80, 489-90; Connelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agents Provocateurs* in 60 Yale L. J. 1090 (1951): ". . . generally regarded with aversion and nauseous disdain" (*id.*, p. 1093); Note, *An Informer's Tale* in 63 Yale L. J. 206, 226, 231 (1953); Garrison, *Some Observations on the Loyalty-Security Program* in 23 Univ. of Chicago L. Rev. 1, 10 (1955); Matusow, *False Witness* (1955); *United States v. Flynn, et al.*, 130 Fed. Supp. 412 (D. C. N. Y. 1955), Hearing Before the Subcommittee of the Senate Committee on the Judiciary to Investigate the Administration of the Internal Security Act, S. Res. 58, 84th Cong., 1st Sess. (1955); *Editorial*, New York Times, February 5, 1955; Griswold, *The Fifth Amendment Today* (1955), p. 16.

Nor is this aversion to the informer of recent vintage. The history of civilization is marked by the condemnation

of this "baleful agency" for which mankind has paid a most sanguinary price. In *Ecclesiasticus*, XXI, 31, it is stated: "The tale-bearer shall defile his own soul, and be hated by all." To this solemn truth the wise men of all ages have attested. Gorham, *The Medieval Inquisition* (Lord, 1918); Lea, *A History of the Inquisition of the Middle Ages* (1922), vol. I, p. 371, 381-7, vol. III, p. 191; May, *Constitutional History of England* (1880), vol. II, pp. 275-6; Sergeant, *Liars and Fakers* (Lord), p. 44; Speech of Edward Livingston against the Alien and Sedition Act quoted in Miller, *Crisis in Freedom* (1951), p. 53—"The country will swarm with informers, spies, delators, and all the odious reptile tribe that breed in the sunshine of despotic power."

Finally, as the record shows, petitioner was concerned in all her mature life with problems of the labor movement. The bitter experiences of trade unions in the organization of unorganized workers at the hands of informers has led to universal distaste among working people, particularly for those who reveal the names of members of an organization. "The disgust of workers with this system of espionage is adequately summed up in the phrase 'stool-pigeon'." Brooks, *When Labor Organizes* (1937), p. 69. The constitutions of many trade unions today forbid the revelation of the names of members lest harm be done them. The reason for this flows out of the role of the informer or spy in American trade union history. Commons, *History of Labor in the United States* (1918), vol. I, p. 403, vol. II, pp. 195-97, 337, 339, 415-16; Huber-

man, *Labor Spy Racket* (1937). The National Labor Relations Board will not, as a matter of policy, reveal, or require the revelation of the names of union members. *Matter of Samson Tire and Rubber Corp. and United Rubber Workers of America*, 2 N. L. R. B. 148, 156; *Matter of R. H. Siskin & Sons and Steel Workers Organizing Committee* (C. I. O.), 4 N. L. R. B. 187, 188, n. 3. In this view the Board has been sustained by the courts. *N. L. R. B. v. New Era Die Co.*, 118 F. 2d 500 (C. A. 3, 1941); *Marlin-Rockwell Corp. v. N. L. R. B.*, 116 F. 2d 586 (C. A. 2, 1941), cert. den. 313 U. S. 594.

Thus, out of this confluence of law and history, indeed out of the mores of the community, the conscientious refusal of the petitioner to identify persons as members and officers of the Communist Party finds substantial support. Considering the undisputed state of the record and the injury which petitioner herself sustained by the observance of her conscience, neither the authority of the court nor the administration of justice would have been affected by permitting petitioner, without further penalty, to maintain her dignity as an individual.

In this connection, one final matter deserves the consideration of this Court. It has not always been true that an accused in a criminal trial was permitted to take the stand in her own defense. That privilege is now granted by 18 U. S. C. 3481. The importance of this reform in the procedural criminal law has been noted by this Court: "In mercy to him, he is by the act in question permitted upon his request to testify in his own behalf in the case.

In a vast number of instances the innocence of the defendant of the charge with which he was confronted has been established." *Wilson v. United States*, 149 U. S. 60, 66.

The aforesaid privilege of an accused to establish his innocence is being largely subverted in these causes. Since the decision of this Court in *Dennis v. United States*, 341 U. S. 494, prosecutions in Smith Act cases have largely turned on the question as to whether the proof establishes beyond reasonable doubt the specific intent of each of the accused to overthrow the Government by force and violence as speedily as circumstances will permit. To establish this mental state the practice has developed to inundate the record with proof of membership and officership in the Party and proof of the principles of Marxism-Leninism and the program of the organization. Generally, from this evidence the jury is left free to infer the guilty intent, very inadequate or no evidence being adduced of overt misconduct. Since the "principles" are deduced from writings, and the evidence concerning membership and officership seldom, if ever, disputed, one important opportunity for an accused to rebut these palpably unlawful inferences is to take the stand and testify concerning her activities and state of mind. If, despite the undisputed record, an accused must sacrifice her conscience at the behest of the prosecutor and the judge or else suffer imprisonment for contempt for 70 days and one year, in addition to the complete discrediting of her testimony, the right granted by 18 U. S. C. 3481 will become largely a fiction. Justice is not satisfied by such circumstances. A prosecutor should win his case on the merits; not by the threat of "contempt" which effectively keeps an accused away from the stand.

2. **The Sentence of One Year Imprisonment for Petitioner's Alleged Contempt of Court Was a Manifest Abuse of Discretion and Constituted Cruel and Inhuman Punishment.**

A. The foregoing considerations point up the shocking severity of the sentence of imprisonment which was imposed upon petitioner here. That it was severe was not disputed by the court below [R. 47]. The court stated, nevertheless: "Its control is not in our province" [R. 47]. It has never been authoritatively held, however, that an appellate court may not revise a sentence in summary contempt proceedings. This Court has afforded relief on more than one occasion. *United States v. United Mine Workers of America*, 330 U. S. 258, 304; *Sacher v. Association of the Bar of the City of New York*, 347 U. S. 388. See, *Offutt v. United States*, 348 U. S. 11, 12-13. "We think, therefore, that in contempt proceedings where the exercise of unlimited discretion is vested in the lower court, an abuse of that power is a proper matter for appellate revision." *In re Gompers*, 40 App. D. C. 293, 334 (1913). And where a sentence by its excessive length or severity is grossly disproportionate to the offense charged, this Court may set it aside as in violation of the "cruel and unusual" punishment provisions of the Eighth Amendment. *Weems v. United States*, 217 U. S. 349, 368-74. Nor is the exercise of judicial discretion unconfined. The notion that "judicial discretion" is some broad, unfettered power free from appellate supervision is without merit. "Judicial power, as contra-distinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion it is a mere legal discretion, discretion to be exercised in discerning the

course prescribed by law; and, when that is discerned, it is the duty of the court to follow it." Bowers, *Judicial Discretion of Trial Courts* (1931), Sec. 10, p. 14; *Osborn v. Bank of United States*, 9 Wheat. 737, 865.

If the "course prescribed by law" is to be discerned in this case, the initial starting place is the history which brought the present contempt statute into existence and the reminder of the Court in *Anderson v. Dunn*, 6 Wheat. 204, of the exercise of "the least possible power adequate to the end proposed." As we have previously noted, Judge Peck sentenced Mr. Lawless to 24 hours imprisonment and suspension of practice for eighteen months. This sentence brought forth the immediate condemnation of Congress, and was one of the motivating causes for the enactment of the Contempt Act.

In the Peck impeachment proceedings, Judge Ambrose Spencer, one of the House Managers, stated: "If Judge Peck had been solicitous only to vindicate the authority of the court, and set an example to deter others, a moderate fine would have answered every purpose. This obvious course . . . was disregarded; to glue his vengeance nothing short of the utter ruin of his victim could satiate him. Stansbury, *Report of the Trial of James H. Peck* (1833), p. 304. Charles A. Wickliffe, another Manager, stated: "We arraign before you a Judge who has exerted a power to deprive a citizen of his liberty, for an alleged offence over which he had no jurisdiction, and if he had, he imposed a cruel and disgraceful punishment, under color of law, upon an innocent man, the Judge acting as accuser, witness, judge and executioner." *Id.*, p. 320. Mr. Buchanan urged that Judge Peck had wrongfully adopted the view that "the punishment is measured by no other standard than the excited feelings of the

judge; and in all the wide field of judicial discretion there is no barrier to protect the accused from his fury." *Id.*, p. 437. "Was not this a 'cruel and inhuman punishment'?" argued Mr. Buchanan.

"Does it not violate the express provisions of the Constitution? Why should he not have been satisfied with the infliction of a fine? Why not punish Mr. Lawless through his pocket? It is not pretended that he had before ever shown any want of respect for that judge. This was the first instance. Even if the judge had possessed the power, a fine of 50 or 100 dollars would have been sufficient to warn others against offending in like manner. This in every point of view would have been infinitely better. But no! Mr. Lawless must be disgraced. He must be sent to gaol." *Id.*, p. 472.

From the earliest date it has been held that the penalty imposed for contempt of court does not partake of many of the elements included in punishment for crime. In most instances the penalty is imposed for offenses which are neither *mala in se* nor *mala prohibita*. In short, a court in contempt proceedings "is not executing the criminal laws of the land." *In re Debs*, 158 U. S. 564, 596.

"Hence, the elements to be considered by legislatures in establishing punishment for specific crimes, namely, the reformation, if possible, of the criminal, the protection of society, and the deterring of others from the commission of crime, are not necessarily to be taken into account in fixing the penalty for contempt. Contempt proceedings are not to be substituted for proceedings for the punishment of crime, but may be resorted to only when essential to enforce the power of a court whose authority has been defied." *In re Gompers*, *supra*, p. 334. See the statement of

Judge Taft in *Thomas v. Cincinnati, N. O. & T. P. R. Co.*, 62 Fed. 803, 823 (C.C., S.D. Ohio, 1894).

In the *Debs* case, aforesaid, in accordance with these principles, although an alleged conspiracy to boycott the Pullman Palace Car Company by threatening to call a strike among the employees of any railroad company hauling Pullman cars was enjoined, and although the order was allegedly violated by obstructing the movement of the mails and commerce generally, property destroyed and life deemed jeopardized, still the sentences imposed for contempt ranged only from three to six months in jail. *In re Debs*, *supra*, p. 573. Again, in *United States v. Shipp*, 214 U. S. 386, 215 U. S. 580, it was found by this Court that a sheriff and his deputies had abetted a mob in lynching a prisoner, and this Court nevertheless imposed sentences of only ninety days and sixty days in jail. If in such extreme cases, sentences of this nature were imposed, it becomes readily observable how cruel and inhuman and grossly excessive was the sentence of one year imprisonment imposed upon petitioner in this case.

What has emerged from the history and the policy of the Contempt Act as well as the limiting principles applicable peculiarly to contempt proceedings is a rule of practice which ordinarily governs both federal and state courts in imposing contempt penalties. That rule of practice generally forgoes fine and imprisonment where doubt exists as to whether any contempt of the authority of the court was committed, or when censure is clearly a sufficiently adequate penalty. See *Matter of Pugh v. Winter*, 253 App. Div. 295, 2 N. Y. S. 2d 9; *Matter of Rothbard v. Brennan*, 263 App. Div. 991, 331 N. Y. S. 2d 361. Even when the obstruction to the administration of justice is plain, courts have usually limited the contempt

sentence to a fine, cognizant of the admonition that "the power to punish for contempt should be exercised sparingly." *Western Fruit Growers v. Gotfried*, 136 F. 2d 98, 101 (C. A. 9, 1943). See also, *Freedman v. State*, 176 Md. 511, 6 Atl. 249; *State v. Tolls*, 160 Ore. 317, 85 P. 2d 366; *United States v. Landes*, 97 F. 2d 378, 381 (C. A. 2, 1938); *Moore v. United States*, 150 F. 2d 323 (C. A. 10, 1945); *Huffman v. United States*, 148 F. 2d 943 (C. A. 10, 1945); *Levinstein v. E. I. DuPont De Nemours & Co.*, 258 Fed. 662 (D. C. Del., 1919). And see, *Penfield Co. v. Securities Ex. Comm.*, 330 U. S. 585.

Imprisonment, therefore, for contempt of court is the exception rather than the rule and is imposed only when the obstruction of the administration of justice is plainly established and the offense to the court's authority extremely serious in character. Yet, as we endeavored to show in the petition for writ of certiorari (App. H), an examination of the decided cases shows that the trial judge here exceeded all bounds of propriety in the prison sentence imposed upon this petitioner. The most serious contempts of court, not in its presence, are punishable only by a maximum prison sentence of six months. 18 U. S. C. 402. The section "ought to have a great weight in punishing criminal contempts under section 385 of 28 U. S. C. A. [now 18 U. S. C. 401]." *Ryals v. United States*, 69 F. 2d 946, 948 (C. A. 5, 1934).²² Moreover,

²²In opposition to certiorari, the United States suggested that the one year sentence of imprisonment was not excessive measured by the twelve months standard set by 18 U. S. C. 192 for legislative contempts. Under 18 U. S. C. 192, an accused is entitled to be tried under an indictment, entitled to confrontation and cross-examination, to subpoena witnesses in his own behalf, entitled to be tried before an impartial judge and jury and convicted only on proof beyond a reasonable doubt. An accused is stripped of all these procedural safeguards in a summary contempt proceeding, and the affronted judge imposes the penalty. Reason and policy would dictate, therefore, the soundness of the *Ryals* decision.

as was also discussed in the petition for writ of certiorari (pp. 31-32), the states have almost uniformly placed statutory limitations upon the power to punish for contempt, a majority of the states providing for a maximum prison term of thirty days or less, with no state exceeding a fixed term of six months (Pet., p. 32).

Thus, when the "course of law be discerned," it appears that the trial judge in this case violated the rule of reason and practice which has been established in the country. In imposing an excessive sentence of one year imprisonment upon petitioner, the trial court abused its legal discretion and punished petitioner cruelly and inhumanly. Especially is this so when it is considered how the alleged contempt arose on this undisputed record; that petitioner had already spent 70 days in jail for her conscientious scruples; and, indeed, had spent more than four months in jail prior to the commencement of the trial because of the failure of the same trial judge to abide by decisions of this Court. See Note, 96 L. ed. 14, 16-17. In most Smith Act trials, where the records were even devoid of all of the aforesaid factors, the sentences were only 30 days imprisonment²³ (Pet., p. 31).

²³In the *Dennis* trial, Judge Medina imposed a sentence of 30 days in civil contempt. There the accused while on the stand introduced an exhibit into evidence on his own behalf, but declined to state who the three persons were who prepared the exhibit under his direction. The prosecution maintained that the names of the persons were relevant to the inquiry for impeachment purposes. The information was solely within the knowledge of the accused, and the prosecution was theoretically "blocked." Compare the sentence of 30 days with the sentence of one year upon the accused here where the sole issue was the identification of named persons as members of the Party, entirely undisputed on the record, and where the petitioner willingly answered she knew the said persons and how long she knew them. *United States v. Gates*, 176 F. 2d 78 (C. A. 2, 1949).

B. An additional reason exists for setting aside the sentence of the court herein. As the Statement of the Case makes plain, the severe sentence imposed here arose out of the trial judge's determination to use all the powers of the court, including the power to punish for criminal contempt, as a means of coercing petitioner to answer the questions involved. It should be noted that the contempt sentence here was imposed after the conclusion of the trial when it was no longer possible for petitioner to purge herself because the trial had ended.

Thus, after the conclusion of the trial, the trial judge insisted that the answers of the petitioner would "have undeterminable potential value to the plaintiff in the criminal case now pending on appeal" (App. C, p. 15). Despite the fact that the trial was concluded, the trial judge stated before imposing the one year sentence: "I take it from the defendant's statement that she is as adamant now as she was the day the questions were put" [R. 28]. Thirty days later (on imposing the three year sentence), the trial judge continued to affirm that if petitioner would answer all questions, the court would modify all the three sentences it had imposed. "Mrs. Yates still has the keys to the jail in her own pocket" [C. 35, pp. 53-5].

It is plain that the failure of the petitioner to answer the questions after the end of the trial weighed heavily with the trial judge in fixing the extent of the punishment. Yet these were patently irrelevant and unlawful considerations which dominated the exercise of the court's sentencing power in the alleged criminal contempt proceedings. Neither the trial judge nor the prosecution had any further legal interest in or right to obtain the answers propounded to petitioner on cross-examination during the trial which had previously been concluded. There were

neither parties nor subject matter before the court; no case in which questions could be asked or answers given. Petitioner was sentenced to a year in jail because of her failure to do that which she could no longer perform or be compelled to perform. *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418; *Parker v. United States*, 126 F. 2d 370 (C. A. 1, 1942); *Loubriel v. United States*, 9 F. 2d 807, 809 (C. A. 2, 1925).

Sentences of contempt entangled with unlawful, irrelevant and extraneous factors violate essential principles of due process and constitute an abuse of judicial discretion when imposed. Punishment so meted out exceeds the contempt power and is illegal. *Oates v. United States*, 223 Fed. 1013 (C. A. 4, 1915); *Gridley v. United States*, 44 F. 2d 716, 743 (C. A. 6, 1930); *Wilborn v. State*, 156 Tex. Cr. 483, 243 S. W. 2d 839 (1953). See also, *Vetterli v. United States*, 344 U. S. 872; *Yasui v. United States*, 320 U. S. 115.

III.

The Trial Judge Was Without Power to Impose Punitive Punishment in Proceedings Essentially Civil in Character and Purpose.

A final reason exists for holding the sentence of one year imprisonment illegal. The contention here is that the dominant purpose of the contempt proceedings was the coercion of petitioner's answers; that the proceedings below were essentially civil contempt proceedings, and that the imposition of a fixed prison sentence in such proceedings was improper, "as fundamentally erroneous as if in an action of 'A vs. B, for assault and battery,' the judgment entered had been that the defendant be confined in prison for twelve months." *Gompers v. Buck's Stove &*

Range Co., 221 U. S. 418, 449. The dominant purpose of the post-trial contempt proceedings was no different than the purpose of the contempt proceedings during the trial when petitioner was initially confined in "civil contempt."

The fact that coercive powers are exercised to allegedly "vindicate the authority of the court" does not transform the civil contempt into criminal contempt. If a trial judge who has lost the power to coerce the answers of a witness after the conclusion of a trial may revive his power thereafter in order to continue his efforts to coerce the answers by placing the gloss of a criminal contempt judgment over the post-trial proceedings, then the strictly limited powers under Rule 42(a) may become unfettered. For this reason, it is not sufficient for the United States to point to the use of some language by the trial judge in the proceedings characteristic of criminal contempt, as it did in opposition to certiorari, or to urge that "almost any contempt has both civil and criminal characteristics" (Br., p. 15). This Court has stated:

"It is true that either form of imprisonment has also an incidental effect. For if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience. *But such indirect consequences will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character or vice versa.*" *Gompers v. Buck's Stove & Range Co.*, *supra*, p. 443 (emphasis supplied).

When the court below expressed the view that "there is no essential dichotomy between 'civil' and 'criminal' contempt"; that the contempt power is "inherent"; and that "if we become involved in the bog of signification of phrases, the clear way will be lost" (App. D, pp. 18-19), it was clearly in error. It was in effect holding that although the trial judge here had lost his power to coerce the answers of the petitioner after the conclusion of trial, still the court could pursue the same objective after trial by imposing fixed jail sentences. But as this Court held in *Gompers*, it is not the imposition of punishment which makes a contempt proceeding criminal; it is the "character and purpose" of the punishment which determines the nature of the proceedings (p. 441). "Where a fine or imprisonment imposed on the contemnor is 'intended to be remedial by coercing the defendant to do what he had refused to do,' . . . the remedy is one for civil contempt." *Penfield Co. v. Securities & Ex. Comm'n*, 330 U. S. 585, 590. See also, *Bassette v. W. B. Conkey Co.*, 194 U. S. 324, 329; *Doyle v. London Guar. & Acc. Co.*, 204 U. S. 599; *Lamb v. Cramer*, 285 U. S. 217, 220; *Maggio v. Zeitz*, 333 U. S. 56, 67.

Every penalty imposed upon petitioner was contingent upon her failure to answer the questions. The record is unmistakable on this decisive characteristic of civil contempt. Cf., *Maggio v. Zeitz*, 333 U. S. 56, 68. The first civil contempt proceeding during the trial was marked by such statements of the court as it would not be "fair to preclude the government on this situation to establish that relationship" [Tr. 11,350]; "To borrow language

from some of the cases, you carry the key to your jail in your own purse. You may purge yourself at any time and be discharged from custody" [Tr. 11,373]. In the second contempt proceedings after the immediate conclusion of the trial, the trial judge continued to seek the answers for the benefit of the plaintiff: "Now, the Government was entitled on cross-examination to show, if they could, that that person whom Mrs. Yates impliedly said was a very foolish person was a friend of Mrs. Yates. . . . We do not know. That is the problem, we do not know; . . ." [R. 32]; "I had hoped by this time that Mrs. Yates might be willing to purge herself; that she might be prompted to do so" [R. 27]; "I hope Mrs. Yates will yet purge herself. I am not interested in imprisoning Mrs. Yates" [R. 37]. Thirty days after the conclusion of the trial, in the third contempt proceeding, the trial judge inquired of petitioner: "Do you wish to answer the questions at this time? You could end it all very simply, Mrs. Yates, by answering the questions" [C. 35, p. 50]; ". . . if you are disposed to purge yourself of this contempt and obey all lawful orders of the court, I will entertain a motion to modify any one, not only this sentence, but any other of the sentences heretofore imposed in the other criminal contempt proceeding which is No. 22,379 on the records of this court" [C. 35, p. 53]; "Mr. Margolis, in view of the indication the court has given, Mrs. Yates still has the keys to the jail in her own pocket" [C. 35, p. 55].

On the record made in the trial court, it is impossible to escape the conclusion that the principal and dominant purpose of all the aforesaid contempt proceedings was to compel petitioner to answer. Since the trial was over, the court attempted to evade the exhaustion of its contempt power by successive sentences of imprisonment after trial. The essential character of the proceedings were, however, not changed by these punitive punishments "... the substance and not the form of the proceeding must govern, and its substance was not criminal." *Hendryx v. Fitzpatrick*, 19 Fed. 810, 812 (C. C. D. Mass., 1884).

Conclusion.

The judgment of the court below should be reversed.

Respectfully submitted,

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Of Counsel.

SEP 22 1956

JOHN T. FEY, Clerk

No. 152

In the Supreme Court of the United States

OCTOBER TERM, 1957

OLIVER O'CONNOR YATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 15

OLETA O'CONNOR YATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 42-48)¹ is reported at 227 F. 2d 851.

JURISDICTION

The judgment of the Court of Appeals was entered on July 26, 1955 (R. 48), and a petition for rehearing was denied on November 2, 1955 (R. 49). The

¹ "R." refers to the record in the case at bar, which bore docket No. 13541 in the Court of Appeals. Petitioner has also filed with the Court the records in two related contempt proceedings involving her—one civil (Court of Appeals docket No. 13527) and the other criminal (Court of Appeals docket No. 13535). See *infra*, pp. 5 (fn. 3), 8-11, 20-31, 35-36. We shall have occasion to refer herein to the former of these records. It will be designated by the abbreviation "R., No. 13527."

petition for a writ of certiorari was filed on November 30, 1955, and was granted on January 16, 1956 (R. 49). 350 U. S. 947. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioner's several refusals to answer the questions constituted, in the circumstances of this case, multiple contempts or but a single contempt; and whether, if the latter, the court acted within its power in sentencing petitioner to a definite period of imprisonment for criminal contempt for one group of refusals after having previously sentenced her to an indefinite period of imprisonment, in a civil contempt judgment, for an earlier group of refusals.

2. Whether the court's purpose in sentencing petitioner to imprisonment in the criminal contempt judgment here involved was primarily that of punishing petitioner, in vindication of the authority of the court, for her past contemptuous conduct, or whether its primary purpose was to coerce her into future compliance for the benefit of the Government as prosecutor.

3. Whether the sentence to one year's imprisonment was a reasonable penalty under all the circumstances and within the admittedly discretionary authority of the court to impose, or whether it constituted cruel and unusual punishment within the proscription of the Eighth Amendment.

STATUTE AND RULES INVOLVED

18 U. S. C. 401 provides in pertinent part:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority and none other, as—

* * * * *

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rules 35 and 42 of the Federal Rules of Criminal Procedure (18 U. S. C. following § 3771) provide in pertinent part:

RULE 35. CORRECTION OR REDUCTION OF SENTENCE

* * * The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

RULE 42. CRIMINAL CONTEMPT

(a) *Summary Disposition.*

A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

* * * * *

STATEMENT

On July 8, 1952, Judge William C. Mathes of the United States District Court for the Southern District of California, pursuant to Rule 42 (a) of the Federal Rules of Criminal Procedure (*supra*, p. 3), signed an "Order, Judgment and Certificate of Criminal Contempt" (R. 3-15) certifying that petitioner, on June 30, 1952, while testifying on her own behalf at a criminal trial presided over by him, had in his presence, and in disobedience of his specific instructions, refused to answer a series of "proper and relevant questions put to her on cross-examination" (R. 3), in violation of 18 U. S. C. 401 (*supra*, p. 3). The questions asked, together with petitioner's refusals to answer, were set forth in the order in eleven numbered specifications (R. 3-14).

On August 8, 1952, following the termination of the trial at which the refusals to answer had occurred, Judge Mathes, pursuant to the authority conferred by the same Rule 42 (a), *supra*, summarily adjudged petitioner guilty of, and sentenced her to one year's imprisonment for, each of the eleven contempts as set forth in the specifications, the terms to run concurrently (R. 16-18).² On appeal to the Court of

² These concurrent sentences were ordered to commence upon the expiration of a five-year sentence (R. 17-18), which had been previously imposed for the offense for which she was on trial when the contempts took place, and of which she had been found guilty a few days earlier.

Appeals for the Ninth Circuit, the judgment of conviction was affirmed (R. 48).²

The pertinent facts may be summarized as follows:

The offense for which petitioner was on trial when the contempts in issue occurred was conspiracy to violate the Smith Act. Thirteen co-defendants were on trial with her.⁴ The indictment alleged that they, together with twelve named but unindicted co-conspirators⁵ and "other persons to the grand jury unknown", had conspired to advocate and teach the duty and necessity of overthrowing by force and violence the Government of the United States, and to organize as the Communist Party of the United States an organization which so advocates and teaches, all with the intent of causing such forcible overthrow as speedily as circumstances would permit (2 Tr. 226-234).⁶ The trial extended from February 5 to August 5, 1952 (2 Tr. 236, 106 Tr. 13897).

² Simultaneously with its affirmance of the judgment in the instant case, the Court of Appeals decided two related contempt cases against petitioner, one involving a civil and the other a criminal judgment. The civil judgment was affirmed in part and reversed in part. *Yates v. United States*, 227 F. 2d 844. The criminal judgment was reversed. *Yates v. United States*, 227 F. 2d 848. The civil judgment is indirectly involved in the case at bar. See *infra*, pp. 8-11, 20-31.

⁴ The convictions of all fourteen of these defendants on the Smith Act charge are the subjects of cases Nos. 6, 7, and 8, this Term (*Yates et al. v. United States*, *Schneiderman v. United States*, and *Richmond et al. v. United States*, respectively).

⁵ These were the defendants in the *Dennis* case. *Dennis v. United States*, 341 U. S. 494.

⁶ "Tr." will be used to refer to the reporter's transcript of the record in the Smith Act conspiracy trial, copies of which are on file with the Court in connection with pending cases Nos. 6, 7, and 8 (see fn. 4, *supra*).

The refusals to answer which are the subject of the instant case occurred on June 30, 1952, the third day of petitioner's cross-examination. On June 26th, the first day of her cross-examination, similar refusals had occurred, these being the contempts involved in the related contempt proceedings decided by the Ninth Circuit but which have not been brought here (see fn. 3, *supra*, p. 5). However, since these earlier refusals are indirectly involved in the present case, it is necessary to relate briefly the circumstances surrounding them before coming to the specific refusals now involved.

Following the completion of the Government's case in chief, all except four of the defendants—petitioner, Loretta Stack, Frank Carlson, and William Schneiderman—rested their cases without putting in any evidence (75 Tr. 10074-10075). Thereupon, petitioner—the only defendant to do so—took the stand in her own defense (76 Tr. 10159). She admitted that she was the Organizational Secretary of the Communist Party of California (85 Tr. 11228). This was the next to the highest executive position in the California Party (4 Tr. 449), second only to that of State Chairman, the position occupied by Schneiderman (85 Tr. 11229). In the course of her direct testimony petitioner testified, among other things, that she had never agreed or conspired with anyone to advocate the forcible overthrow of this Government; that the Communist Party had never so advocated or had any such purpose according to her understanding of its teachings, tenets, and program; and that she person-

ally had never had any intent to effect such forcible overthrow (80 Tr. 10703, 83 Tr. 11099, 84 Tr. 11159-11160).

The refusal of June 26th (morning session).—On the morning of June 26, 1952, following nine days of direct testimony, petitioner's cross-examination began (85 Tr. 11228). In reply to questions of the prosecutor, she testified that her co-defendant Schneiderman was the Party's California State Chairman (85 Tr. 11229); that prior to her arrest in 1951 she had often met with other Party leaders at the Party's Los Angeles headquarters in connection with her Party duties (85 Tr. 11231-11233); and that among the leaders with whom she had thus conferred was co-defendant Carlson (85 Tr. 11233).

She was then asked "[w]ho else * * * of the defendants" she had met with at these headquarters in connection with her Party duties (85 Tr. 11234). She refused to answer this question, stating that she was (85 Tr. 11234-5)—

* * * not willing to provide names and identities of people other than those that I have indicated, because I believe that in the case of the other defendants their case is already rested and I would only be contributing toward adding to the prosecution case against them, and I think that that would be becoming a government informer and I cannot do that. * * * I am not willing to do anything that is going to harm the defense of other people and * * * open up the door for persecution and harassment of other people.

Upon being directed by Judge Mathes, the presiding judge, to answer the question, she persisted in her refusal, notwithstanding her understanding of the "possible consequences" of such refusal (85 Tr. 11239). The matter was not further pursued at the morning session.

The refusals of June 26th (afternoon session), leading to the civil contempt judgment.—In the afternoon session of the same day, June 26, 1952, petitioner was asked four additional questions (R., No. 13527, pp. 3-7) which she declined to answer after being instructed to do so by the court, for which refusals she was adjudged in civil contempt.

The first question was whether petitioner, at any time since she had been a member of the Communist Party, had ever known one Harry Glickson—an individual whose name had figured prominently in the Government's evidence as an important co-conspirator of the defendants on trial¹—to be a Party member (R., No. 13527, p. 3; 85 Tr. 11312). Petitioner had given direct testimony relating to Glickson (see 85 Tr. 11309-11310) and had previously admitted on cross-examination that she was personally acquainted with him (85 Tr. 11310). Nevertheless, she refused to state whether or not she knew Glickson to be a Communist

¹ The evidence indicated that Glickson had been a prominent Party member operating in the San Francisco area, the area with which petitioner herself was most closely identified (33 Tr. 4425-4447; 34 Tr. 4462-4488; 36 Tr. 4707-4708, 4739, 4742; 37 Tr. 4762, 4777, 4780, 4812, 4825, 4836-4844; 38 Tr. 4909, 4911; 51 Tr. 6593-6594).

on the ground that (R. No. 13527, pp. 3-4; 85 Tr. 11312)—

* * * that is a question which, if I were to answer, could only lead to a situation in which a person could be caused to suffer the loss of his job, his income, and perhaps be subjected to further harassment, and in a period of this character, where there is so much witch-hunting, so much hysteria, so much anti-communism, I am sorry I cannot bring myself to contribute to that.

Upon being instructed by the court to answer the question, she persisted in her refusal, for which she was pronounced "in contempt" (85 Tr. 11312-11313).

The second and third questions to which petitioner refused answers on this occasion were likewise concerned with Glickson and were similar in character except that they referred to particular periods of time (R., No. 13527, pp. 4, 5; 85 Tr. 11313-11315). In refusing to answer, petitioner further elaborated upon her reasons. She stated (R., No. 13527, p. 6; 85 Tr. 11315):

However many times I am asked and in however many forms, to identify a person as a communist, I can't bring myself to do it, because I know it means loss of job, * * * persecution for them and their families, * * * [and] even opens them up to possible illegal violence, and I will not be responsible for that.

The fourth and final question was whether it was not true that Frank Spector, a co-defendant who had previously rested his case (see *supra*, p. 6), had been

elected at the Party's 1950 California State Convention to be a delegate to its National Convention of that year (R., No. 13527, p. 6; 85 Tr. 11316-11318). Petitioner had, only a moment previously, testified readily that her co-defendants Schneiderman and Stack had been delegates to this State Convention, explaining that Schneiderman had, and that Stack had not, been elected at the convention as a delegate to the National Convention (85 Tr. 11317-11318). But on being asked the same question regarding Spector, she refused to answer, stating, as she had previously said at the morning session (see *supra*, p. 7), that she would not be an "informer" against "defendants who have rested their case, and do not propose to put on any further defense" (R., No. 13527, p. 7; 85 Tr. 11319).

At the conclusion of the afternoon session, Judge Mathes inquired of petitioner whether she was "prepared at this time to purge [her]self" of her several contempts committed during the session (85 Tr. 11367). When petitioner replied that she was not (*ibid.*), the judge directed, in a civil contempt judgment (R., No. 13527, pp. 3-8), that she "be committed to the custody of the United States Marshal * * * until such time as she may purge herself of the contempts by answering the questions * * * or until further order of the Court" (*id.*, p. 8; 85 Tr. 11372-11373). Petitioner never sought to purge herself

of these contempts and remained in custody for the balance of the trial.*

The refusals of June 30th, leading to the criminal contempt judgment involved at bar.—On June 30, 1952, while still under cross-examination, petitioner refused to answer, after being instructed to do so by the court, eleven additional questions put to her by the prosecutor (Specifications I–XI, R. 3–14), for each of which refusals she was adjudged guilty of criminal contempt. These are the refusals directly involved in the contempt judgment now before the Court.

Specifications I–III (R. 3–5) each involve a question relating to one Leon Kaplan, who was identified by government witnesses as a high-level participant in Communist Party affairs in San Francisco.* Specifi-

* The trial ended on August 5, 1952. Thereafter, until August 30, 1952, all of the defendants in the main case, including petitioner, were confined under the judgments of conviction in that case. On the latter date, all were released on bail. From September 3 to September 6, 1952, petitioner was again confined pursuant to the civil contempt order of June 26th (see text, *supra*). On the latter date she was released on bail pending appeal from the order directing her reconfinement. This order was later reversed on the ground that, the jury having been discharged, compliance with the trial court's orders directing the answering of the questions involved was no longer possible. *Yates v. United States*, 227 F. 2d 844. From September 8 to September 11, 1952, petitioner was again confined, this time pursuant to a criminal contempt judgment based upon the same refusals to answer as those on which the civil contempt order had been based. On the latter date she was released on bail pending appeal from that judgment, which was also later reversed. *Yates v. United States*, 227 F. 2d 848.

* See, e. g., 42 Tr. 5438–5444, 5453–5454; 59 Tr. 7903, 7930; 60 Tr. 8023, 8025, 8026, 8028, 8037.

cations IV, V, and XI (R. 5-8, 13-14) involve questions relating to three other individuals who had figured prominently in government testimony as Party members and co-conspirators, namely, Ida Rothstein, Herschel Alexander, and Celeste Strack, respectively. Specifications VI-X (R. 8-13) involve questions relating to co-defendants of petitioner who had previously rested their cases (see *supra*, p. 6), namely, Al Richmond, Dorothy Healey, Frank Spector, Ernest Fox, and Albert Lima, respectively.

In each of the eleven instances, the question asked was either whether the person referred to was known to petitioner as a member of the Communist Party, or it was otherwise of such a character that petitioner, by replying, must needs have indicated whether or not the person named was known to her as such. Petitioner had no hesitancy in testifying that she knew the various individuals mentioned (see, *e. g.*, R. 4, 5, 6, 13-14), but she refused, as she had on June 26th with respect to other persons, to state whether or not she knew them to be Communists. In so doing, however, she shifted the grounds of her refusal with respect to all individuals other than co-defendants. While on the former occasion she had announced categorically that she would under no circumstances "identify a person as a communist" (*supra*, p. 9), on this occasion she drew certain distinctions concerning, and attached certain qualifications to, her previously-expressed attitude. She now limited the persons whom she refused to identify as Communists, though known to her as such, to persons who in her judgment could "be hurt

by" such testimony, or members of whose families could thus be hurt.

"I feel", she explained, "that these people are in a position where my identification of them as communists would do them an inestimable amount of damage" by "harming their ability to make a livelihood" or "hurting their families" (87 Tr. 11618). She was quite willing, however, she said, to "give the names of people whom I know I cannot hurt" (*ibid.*). For example, she was "willing to name people who may have died," she said (R. 7; 87 Tr. 11623), and in fact she did name as a Communist, in response to a prosecution question, at least one deceased person, one "Mike Quin" (87 Tr. 11595). Even with respect to deceased persons, however, she qualified her expressed willingness to testify with respect to their Communist affiliations with the proviso that to do so would not, in her judgment, hurt their "families" (*ibid.*; and see 87 Tr. 11618-11619). In the case of living persons who were "employed by the Communist Party", she agreed that such persons would not personally be injured—by being "discharged" and thus losing their "livelihood[s]"—if she identified them as Communists (87 Tr. 11618-11619). She pointed out, however, that "members of their families" might suffer "in many different ways" as the result of such testimony on her part (87 Tr. 11619), with the consequence that even with respect to such persons she would have to consider the facts in each case before deciding whether she would be willing to testify concerning them.

For all these reasons, she made it clear, it was impossible for her to make any general statement as

to what persons, known to her as Communists, she would be willing to identify as such in response to prosecution questions; she would have to decide in each instance whether such identification by her could hurt either the individual himself or some member of his family (R. 7; 87 Tr. 11618-11619, 11623).¹⁰ The record does not reflect how close a "family" relationship would have to exist between a person known to her as a Party member, but whose identification as such by her could not in her judgment hurt him personally, and another person who in her opinion could be hurt by such testimony, to have justified her in refusing to make the identification.

At the conclusion of the session, after the jury had been excused, the judge told petitioner and her counsel (87 Tr. 11634):

I expect to treat the contempt[s] of the court committed by the defendant Yates in today's session as criminal contempt pursuant to Rule 42 (a) * * * and deal with them independently as far as punishment is concerned.

At the request of counsel, immediate action on the matter was deferred (87 Tr. 11634-11635).

¹⁰ For example, when she was asked whether "a Mr. Herschel Alexander" was a member of the Party's California State Committee for the year 1950, she replied, after admitting that she knew Alexander: "Well, that, again, comes into the same category. I can be asked 500 names, and if my identification of these people who are living people who can be hurt by my public identification of them, as they can be, then I cannot answer it. I am willing to name people who may have died, whose families cannot be —" (R. 6-7; 87 Tr. 11623).

The contempt adjudication and sentence.—On July 8, 1952, the court signed the criminal contempt certificate certifying the facts concerning the above-recounted refusals by petitioner to answer questions on June 30th (R. 3-15). See *supra*, p. 4. On August 5, 1952, the jury returned its verdict of guilty in the principal case against petitioner and each of her co-defendants (106 Tr. 13866-13873), and on August 7th she was sentenced to five years' imprisonment and to pay a fine of \$10,000 in that case (108 Tr. 14154-14155). On the following day, August 8, 1952, as previously noted (see *supra*, p. 4), petitioner was adjudged guilty of criminal contempt for each of her eleven refusals to answer on June 30th, and was sentenced to one year's imprisonment on each specification, the terms to run concurrently with one another but consecutively to her five-year sentence in the principal case (R. 16-18).

In the course of a colloquy with counsel for petitioner immediately preceding the imposition of sentence, the judge remarked to counsel that he (R. 27)—

* * * had hoped by this time that Mrs. Yates might be willing to purge herself * * *.

Counsel for petitioner pointed out to the judge that it was no longer possible for petitioner to purge herself since, "the trial having been completed", "her answering the questions at this point" could not possibly "aid [the] jury" (R. 27). The judge replied

that, while that was true, it was nevertheless still within petitioner's power (R. 27-28)—

* * * to purge herself to the extent that she bows to the authority of the court.

Contempt is a defiance of the authority of the court and the authority of the court must be vindicated.

It could have no effect upon this proceeding and need not be accepted as a purge, because of the fact that the time has passed, as you point out, Mr. Margolis, for the administration of justice in this case to be affected by it.

Nonetheless, as I view it, the court, in its discretion, might treat answers now to the questions as a vindication of judicial authority and treat it as purged.

The question of the possibility of petitioner's "purging" herself even after the trial had been concluded was again adverted to in colloquy immediately following the imposition of sentence. The judge remarked at that time (R. 36-37):

I hope Mrs. Yates will yet purge herself. I think, in offering to accept her answers now as a purge is [*sic*] a humane, merciful thing to do under the circumstances.

I am not interested in imprisoning Mrs. Yates. I am interested in vindicating the authority of this court, which I feel must be vindicated when anyone wilfully refuses to obey a lawful order of the court.

If she at any time within 60 days, while I have the authority to modify this sentence under the Rules, wishes to purge herself, I will be inclined even at that late date to accept her submission to the authority of the court.

SUMMARY OF ARGUMENT

I

This case does not involve, as petitioner claims, the multiplication of an essentially single offense into several crimes.

1. The judge was not precluded from invoking his *criminal* contempt powers with respect to petitioner's June 30th refusals by virtue of his having, on June 26th, invoked his *civil* contempt powers with respect to her refusals of the latter date, even if it be assumed with petitioner, *arguendo*, that her several refusals of both days constituted but one contempt. The purposes of a civil and of a criminal contempt sentence being essentially different—the one being coercive, the other punitive—one and the same contumacious act can be the subject both of a civil and of a criminal contempt judgment. *United States v. United Mine Workers*, 330 U. S. 258.

2. But petitioner's refusals to answer the various questions put to her on June 26th and June 30th did not constitute but a single, cumulative act of contumacy, as she contends. Her general statement of June 26th that she would under no circumstances identify as a Communist anyone about whom she was asked—even if consistently adhered to by her throughout her cross-examination, which it was not—amounted to no more than a blanket advance declaration of an intention not to be cooperative. A witness cannot effectively limit the sanction of contempt by general pronouncements as to the classes or types of question he will or will not reply to. The separate

questions which petitioner refused to answer were not mere variant repetitions of a single inquiry which petitioner had once refused to answer, but distinct and appropriate inquiries as to various individuals all of whom were separately important in the trial then underway. Petitioner's broad pronouncement of June 26th did not transform the prosecutor's subjects of inquiry from the Communist connections of the various individuals named in the questions into a single inquiry as to whether petitioner knew any Communists at all.

3. Furthermore, and equally important, it was never petitioner's "position" at the trial that, as she now claims, she would under no circumstances identify as a Communist anyone about whom she was questioned. Some persons she readily identified as Communists. The only objective test which she used in deciding whether she would or would not testify as to an individual's Communist Party membership had to do with her co-defendants:—With respect to co-defendants who had rested their cases, she refused to testify; with respect to the others, she readily admitted that they were Communists. With regard to all persons other than co-defendants, her self-imposed test of whether or not she would identify them as Party members was whether or not in her opinion she could "hurt" them (or members of their families) by so doing. In these circumstances, there were at least as many separate contempts as the number of persons concerning whom she was questioned (counting co-defendants cumulatively as one). On this basis her

contempts numbered at least six, of which some were committed on June 26th and some on June 30th.

II

The record clearly indicates that the principal if not the sole purpose of the contempt judgment here involved was to vindicate the authority of the court. This is the characteristic purpose of a criminal contempt judgment. The imposition of a criminal sentence was therefore proper. The judge's expression of hope at the time of sentencing that petitioner would yet "purge" herself was at most (since the trial at which her refusals had occurred was then over) an invitation for her to show regret for her contumacious conduct by answering the questions even at that late date—the judge indicating that, if she did that, he would shorten her sentence, or possibly even suspend its execution.

III

Petitioner's sentence to one year's imprisonment was not excessive in the light of her deliberate and repeated flouting of the authority of the court. When a defendant takes the witness stand, his waiver of immunity "is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing" (*Raffel v. United States*, 271 U. S. 494, 497). The record shows that petitioner sought to arrogate to herself the "management of the trial" (*United States v. Gates*, 176 F. 2d 78, 80 (C. A. 2)) with respect to all matters pertaining to her own cross-

examination. Her general attitude was one of defiance of the judge's authority. The amount of her punishment admittedly lay within the judge's discretion, and the sentence which he imposed was the product neither of haste nor of the heat of altercation. Nor was it excessive by the standards of statutory and case law.

ARGUMENT

I

THIS CASE DOES NOT INVOLVE, AS PETITIONER CLAIMS, THE MULTIPLICATION OF AN ESSENTIALLY SINGLE OFFENSE INTO SEVERAL OFFENSES

Petitioner's primary contention—a contention which she advanced for the first time in her petition for a writ of certiorari—is that her contumacious series of refusals constituted but one contempt in substance; and that this single offense was unwarrantedly proliferated, by an astute prosecutor and a willing judge, into multiple offenses by the device of repeating an essentially single question in a variety of forms (Pet. 19-20; Br. 25-39).¹¹

¹¹ Neither in her petition for certiorari nor at any prior stage of the case did petitioner deny that the questions she refused to answer were all relevant to the trial or that her refusals constituted at least one contempt. However, her brief on the merits contains a long section (Br. 40-50) arguing that the trial judge was not "warranted at all in holding that petitioner had committed a punishable contempt". This issue, not having been presented in the petition, is not properly before the Court (see Revised Rules, Rule 40 (1) (d) (2)).

In any event, the point has no substance. At a Smith Act conspiracy trial, it is certainly relevant to know whether the defendants are Communists and whether they consort with Communists. Petitioner insists that there was no dispute as to

"When the petitioner on the first day of her cross-examination made her position clear," according to the argument, "the prosecution could not multiply the contempts, and the court the punishments, by continuing to ask petitioner questions each time eliciting the same answer: her refusal to identify persons as members of the Communist Party" (Pet. 19-20; Br. 28-29, 35-36). Her "refusal was total on June 26," says petitioner, and "the imposition of punishment for the offense"—i. e., the sentencing of petitioner on that date, in a civil contempt judgment, to

the Communist character of the persons she was asked to identify (Br. 6, 8, 14, 42-4); but the prosecution could properly ask an admitted and knowledgeable Communist to confirm for the jury the Communist identity of those individuals and, if possible, to indicate the nature of their Communist activities. Moreover, petitioner had denied any participation in the conspiracy even though she associated with these persons, and it was therefore clearly relevant to show, through her own testimony, her knowledge of their Communist character (see R. 32; Pet. Br. 16). As a voluntary witness in her own behalf, she completely waived her privilege against self-incrimination even though cross-examination might be "inconvenient or embarrassing". *Raffel v. United States*, 271 U. S. 494, 497.

As for petitioner's claim of a legal immunity against "informing" (Br. 44-50), it is, of course, settled that there is no such privilege where the questions are otherwise proper. Cf. *On Lee v. United States*, 343 U. S. 747, 756-758; *Caminetti v. United States*, 242 U. S. 470, 492-5; *United States v. Dennis*, 183 F. 2d 201, 224-5 (C. A. 2), affirmed, 341 U. S. 494; *United States v. Kamin*, 136 F. Supp. 791, 799-800 (D. Mass.). Every day in the criminal courts witnesses with relevant testimony "inform" on defendants by revealing facts which help to convict those defendants; the testimony of accomplices or close associates, for example, is routine. Furthermore, it should not be forgotten that, by refusing to testify, petitioner was helping *herself* (not only others) by denying the prosecution the opportunity to disprove her disavowal of participation in the conspiracy.

remain in custody until she purged herself (see *supra*, pp. 10-11)—“exhausted the sentencing power of the court” (Pet. 22; Br. 39). Consequently, the argument concludes, her “refusal to answer similar questions on the same grounds on the identical subject matter” on June 30th “did not constitute a contempt of court separately punishable” (*ibid.*).

The contention is without merit. This case does not involve, as petitioner claims, an attempt by court and prosecutor to multiply an offense which was essentially single into several crimes. On the contrary, the case presents an instance of the proper application of established principles of the law of contempt.

1. In the first place, Judge Mathes, by directing that the criminal sentences of one year each which he imposed on petitioner for her June 30th refusals to answer eleven questions should be served concurrently (*supra*, pp. 4, 15), in fact treated her refusals of that day as in effect a single offense. The judge was not precluded from invoking his *criminal* contempt powers with respect to petitioner's June 30th refusals by virtue of his having on June 26th invoked his *civil* contempt powers with respect to her refusals of the latter date, even if it be assumed with petitioner, *arguendo*, that her several refusals of both days constituted but one contempt. The purposes of a civil and of a criminal contempt sentence are essentially different. The one is coercive and looks to the future, the other is punitive and looks to the past.¹² For this

¹² In civil contempt the sentence imposed is primarily coercive in character and purpose. It is intended to benefit a party to the litigation who has been damaged by the offender's contu-

reason, it is settled that one and the same contumacious act can be made the subject both of a civil and of a criminal contempt judgment. *United States v. United Mine Workers*, 330 U. S. 258, 303, 305; *Penfield Co. v. Securities & Exchange Commission*, 330 U. S. 585, 593-594; *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 441-443.

Even, therefore, if we assume what we do not grant in fact (see *infra*, pp. 24-30)—that petitioner's refusal to answer questions on both days constituted but a single contempt—it would still follow that the judge acted entirely within his power in invoking, with respect to that single contumacious act, the sanctions both of civil and criminal contempt. Incarceration under the civil sentence of June 26th was terminable at the will of petitioner, so that she carried "the key of [her] prison in [her] own pocket" (*In re Nevitt*, 117 Fed. 448, 461 (C. A. 8)). It was surely reasonable for the judge first to attempt to secure compliance with his orders by means of this mild sanction, and only later, when it had become apparent that the civil sentence was failing in its purpose, to resort to criminal punishment as a deterrent against

macy. A criminal contempt judgment, on the other hand, is primarily punitive in nature, being designed to "vindicate the authority of the court." See *United States v. United Mine Workers*, 330 U. S. 258, 302-305; *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 441-443. A person incarcerated under a civil contempt judgment can terminate his confinement at will by complying with the court's command. The period of confinement under a criminal contempt judgment, on the other hand, is of fixed duration. See *infra*, p. 32.

like offenses in the future and to vindicate the authority of the court. If petitioner were right that the imposition of the milder civil sentence totally exhausted the judge's powers both to coerce compliance and to vindicate the court's authority, it would follow that she had it within her power permanently to flout that authority at no greater risk than the suffering of the relatively mild inconvenience of spending the balance of the trial, then already far advanced, in the custody of the marshal. The law of contempt, we submit, contemplates no such possibility of "easy victory" for a recalcitrant contemnor. *Penfield Co. v. Securities & Exchange Commission*, 330 U. S. 585, 51-594.

2. But we do not agree that petitioner's refusals to answer the various questions put to her on June 26th and June 30th constituted but a single, cumulative act of contumacy, as she contends. She relies, of course, on the fact that she told the prosecutor and the judge on June 26th, the first day of her cross-examination, that "[h]owever many times [she was] asked" she would not "identify a person as a Communist" (Br. 9, 25, 36; see *supra*, p. 9). But this general statement on her part—even if consistently adhered to by her throughout her cross-examination, which it was not (see *infra*, pp. 27-30)—amounted to no more than a blanket advance declaration of an intention not to be cooperative. It could hardly preclude separate convictions for refusals to answer specific questions concerning the Party connections and activities of her various co-conspirators, who had been

identified as such by government witnesses. If petitioner were right, a witness could effectively limit the sanction of contempt by general pronouncements as to the classes or types of questions he would or would not reply to. But such a broad power to "pick and choose the questions to which he will give answer" has never, as pointed out by the court below, belonged to any witness (R. 47), and the courts have not hesitated to use their authority to quell continued defiance.

It is true that a witness' refusal to answer a certain question cannot be made the basis of multiple contempts by continuing to ask the same question in different forms (*United States v. Orman*, 207 F. 2d 148, 160 (C. A. 3); *United States v. Yukio Abe*, 95 F. Supp. 991, 992 (D. Haw.); *Fawick Airflex Co. v. United Electrical, Radio & Machine Workers*, 92 N. E. 2d 431, 436 (Ohio App., 1950); *Maxwell v. Rives*, 11 Nev. 213), just as it is true, on the same principle, that where a witness flatly refuses to testify at all his contempt cannot be multiplied by repeatedly asking him questions. *United States v. Costello*, 198 F. 2d 200, 204 (C. A. 2), certiorari denied, 344 U. S. 874.

But the principle on which these and other cases relied on by petitioner (Br. 32-34) rest has no applicability here. The separate questions which petitioner refused to answer were not mere variant repetitions of an inquiry which petitioner had once refused to answer. The questions did not "seek to establish but a *single fact*, or relate to but a *single subject of inquiry*" (*United States v. Orman*, *supra*,

207 F. 2d at 160 [emphasis added]); they rather sought to prove a number of facts and related to at least as many subjects as the number of persons referred to in the questions, i. e., nine different persons (see *supra*, pp. 7-12).

Petitioner's broad pronouncement on June 26th (*supra*, pp. 7, 9) did not transform the prosecutor's subjects of inquiry from the Communist connections of the various co-conspirators named in the questions—matters thoroughly relevant to the trial at which petitioner was testifying (see fn. 11, *supra*, pp. 20-21)—into a single inquiry as to whether petitioner knew any Communists at all. If the latter had been the purpose of the prosecutor's questions, there might be some merit to petitioner's contention that her several refusals, though multiple in form, were but one in substance—at least if she had consistently adhered to her initially-expressed attitude throughout her cross-examination, which she did not (see *infra*, pp. 27-30). But it was obviously not the purpose of the prosecutor to seek to elicit by his questions whether petitioner, who had admitted in her testimony that she occupied the No. 2 post in the Communist Party of California (*supra*, p. 6), knew any Communists at all. Petitioner cannot properly claim, therefore, that the questions in issue were

simply repetitions of, or attempts to reframe in a variety of forms, a single inquiry.¹³

3. Furthermore, and equally important, it is not true that, as petitioner states (Br. 25-26), she apprised the court at the beginning of her cross-examination, and continued throughout the questioning to insist, that she "would not identify persons as members of the Communist Party no matter how many times she was asked" (Pet. 22). Here again, if the record supported this assertion of petitioner, there might be some ground—or at least we shall so assume—for her contention that her refusals, though plural in form, were but one in essence. But the fact is, as the Statement, *supra*, pp. 7-14, makes clear, that petitioner did not adhere to any such position during her questioning. As a matter of fact, though she did at one point *say* that she would under no circumstances identify a person as a Party member, the actual answers which she gave to questions, from the very beginning of her cross-examination, were completely inconsistent with that statement of "position".

Petitioner's "position" at the trial was not that she would not identify as members of the Communist Party *any* persons known to her as such. She freely

¹³ Petitioner distinguishes (Br. 39, fn. 21) the *Costello* case, 198 F. 2d 200 (C. A. 2), *supra*, p. 25 which held (*inter alia*) that separate refusals to testify on two different days constituted two contempts, on the ground that Costello's reasons for defiance differed somewhat on the two days. Certainly, if that mere difference supports Costello's convictions, petitioner cannot challenge her convictions based on separate inquiries as to a number of individuals, all of whom were significant to the Smith Act trial then in progress.

and without hesitancy, for example, identified as Party members her co-defendants Stack, Carlson, and Schneiderman (*supra*, pp. 7-10). She likewise willingly named as a Party member the individual identified in the record as "Mike Quin" (*supra*, p. 13). And she did the same in the case of Party leader Foster, an alleged but unindicted co-conspirator.¹⁴ She declared her willingness, as we have seen, to identify as a member of the Party anyone known to her as such, provided the individual in question did not fall within one of the following categories: (1) those of her co-defendants—ten in number—who had previously rested their cases (*supra*, pp. 6-7), and (2) persons, living or dead, who—or members of the families of whom—could *in her judgment* "be hurt by" such testimony (*supra*, pp. 11-14). Whether or not a person came within the latter category was a decision which she made on a question-by-question, individual-by-individual basis.¹⁵

¹⁴ *Cf.* Judge Mathes' observation that he found it "difficult to reconcile her readiness to testify as to William Z. Foster and her unreadiness to testify as to the persons concerning whom she refused to answer, as a matter of principle" (86 Tr. 11383).

¹⁵ For example, in replying to the prosecutor's question as to whether it was not a fact that "Mike Quin" was "during his lifetime * * * a member of the Communist Party", she said (87 Tr. 11595):

Mike Quin is dead now and I do not believe that I can do him any harm, any damage. He is beyond that. And I am going to answer that question and say yes, he was, because Mike Quin was one of the people who was proudest of his membership in the Communist Party * * *.

The first of these categories was definite and objective enough, since the identity of the individuals in it was a matter of record; we may therefore assume at this point, *arguendo*, that petitioner's specific refusals to answer questions with respect to the individuals in that category constituted but one contempt. But the second of her categories was of a different character entirely. For there was manifestly no *objective* norm by which anyone could know whether a given individual came within it or not. Petitioner alone knew whether or not a named individual might meet the test she had laid down for herself. Neither the prosecutor nor the judge could possibly know in advance what petitioner's decision would be with respect to a given individual, and she made it clear to them that her decision in each case would depend upon her subjective appraisal of the person's circumstances. With petitioner thus arrogating to herself "the management of the trial" and determining for herself "what testimony to give and what to withhold" (*United States v. Gates*, 176 F. 2d 78, 80 (C. A. 2)), the prosecutor had no choice but to question petitioner on a person-by-person basis.

Wholly apart from the other reasons we have given (*supra*, pp. 22-27), there is thus no foundation in the record for petitioner's claim that an essentially single act of contumacy was unwarrantedly multiplied by court and prosecutor into multiple offenses. There were at least as many offenses as the number of persons—counting co-defendants cumulatively as one, for the reason stated (*supra*, pp. 28-29)—to whom the

prosecutor referred in the questions which petitioner refused to answer. In other words, petitioner's offenses—of which some were committed on June 26th and some on June 30th—numbered at least six.¹⁶ Since even under petitioner's view (Pet. 22; Br. 39), two contempts are all that would be required to sustain the judge's action in sentencing her for criminal contempt in addition to civil contempt,¹⁷ it follows that, for reasons wholly apart from and in addition to those previously discussed (*supra*, pp. 22-27), her challenge to that sentence cannot be sustained.

4. Petitioner invokes the genesis of, and the general course of decisions under, the federal contempt statute as a reason for holding that her contempt was at most single (Br. 29 *ff.*; 40 *ff.*). But nothing in that history teaches that Congress desired to deprive the courts of power effectively to deal with disobedience of their valid orders in their presence.¹⁸ Nor does the

¹⁶ *I. e.*, her refusal with respect to (1) Glickson, (2) Kaplan, (3) Rothstein, (4) Alexander, (5) Strack, and (6) all co-defendants concerning whom she refused answers. See *supra*, pp. 8-10, 11-12.

¹⁷ Petitioner does not question the validity of the civil contempt judgment. See *Yates v. United States*, 227 F. 2d 844, 848. At issue in that case was merely the continued vitality of the civil judgment after the termination of the principal trial.

¹⁸ The various decisions cited by petition (Br. 29-31, 40-42) all deal with contempts committed outside the presence of the court.

proper construction of the contempt statute require that recalcitrant witnesses be left wholly undisciplined or only partially punished.

As we have pointed out (*supra*, pp. 22-24), to hold that the court's contempt power in this case was exhausted by its civil judgment after the events of June 26th would be drastically to diminish its authority to compel compliance with its orders. And it would be similarly obstructive to permit a witness like petitioner to "pick and choose" what questions she will answer and on what conditions, and by such tactics to prevent full development of the prosecution's case against her and her co-defendants (see *supra*, pp. 24-30). In sum, the court here exercised "the least possible power adequate to the end proposed" (*Anderson v. Dunn*, 6 Wheat. 204, 230-231).

II

SINCE THE PURPOSE OF THE CONTEMPT JUDGMENT WAS PUNITIVE RATHER THAN COERCIVE, THE IMPOSITION OF A CRIMINAL SENTENCE WAS PROPER

Also without merit is petitioner's contention (Br. 58-62) that the "dominant purpose" of the contempt judgment here in issue was "to coerce," "for the benefit of the plaintiff" (*i. e.*, the prosecution), answers to the questions which she had refused to answer (Br. 58, 61); that, in other words, the judgment was "essentially civil in character and purpose" (Br. 58),

with the alleged consequence that the judge "was without power to impose punitive punishment" thereunder (*ibid.*).

Almost any contempt of court has both civil and criminal characteristics. *United States v. United Mine Workers*, 330 U. S. 258, 298-299; *Lamb v. Cramer*, 285 U. S. 217, 220-221; *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 441-443; *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 329. A refusal to obey an order of the court is not only an affront to the authority of the court, but may also prejudice the case of the opposing party. If the incarceration to which a contemnor is sentenced has as its principal purpose the punishment of the offender in vindication of the court's authority and the deterrence of like derelictions in the future, and is of fixed duration, the contempt judgment is considered criminal in character. If on the other hand the recalcitrant is ordered to be held in custody solely for the purpose of coercing him to do what he has refused to do, and the confinement is directed to last only so long as the recalcitrance continues, the judgment is considered civil in nature. *Gompers v. Bucks Stove & Range Co.*, *supra*, 221 U. S. at 441-443; cf. *United States v. United Mine Workers*, *supra*, 330 U. S. at 302-305. See also fn. 12, *supra*, p. 22.¹⁰

The judgment involved at bar had as its principal if not its only purpose the punishment of petitioner in vindication of the authority of the court, and so

¹⁰ As we have seen (*supra*, pp. 22-23), both types of judgment may be imposed for the same contumacious act.

was properly made criminal in character.²⁰ On the very day on which the refusals in question occurred, Judge Mathes told petitioner and her counsel that he intended to treat the refusals as "criminal contempt" (*supra*, p. 14).²¹ On the day of sentencing, both before and after imposing sentence, he made very clear, in repeated statements, that his purpose was to "vindicate" the "authority of the court" in punishment of petitioner's "defiance" of that authority (*supra*, pp. 15-16). The vindication of the authority of the court is, as we have pointed out, the normal and characteristic purpose of, and motivating factor in, a criminal contempt judgment (see *supra*, p. 32).

It is true, as petitioner stresses (Br. 60-61), that in sentencing petitioner Judge Mathes expressed the hope that she would "purge" herself of contempt (*supra*, pp. 15-16). But his use of this expression

²⁰ That the judgment is in fact criminal in character is clear. The order and certificate was entitled in "criminal contempt" (*supra*, p. 4), the judgment and commitment referred to petitioner's having been "convicted of * * * criminal contempts" (R. 17), and the sentence was to a fixed term of imprisonment (*supra*, p. 4)—the hallmark of a criminal as distinguished from a civil contempt judgment (*supra*, p. 32). Petitioner, indeed, does not question that the judgment is criminal. Her contention is rather that the judge acted improperly in making the judgment criminal in character because his purpose, she claims, was not to *punish* her for her contumacious refusals to answer questions, but solely to *coerce* her to answer them.

²¹ It is established practice for a trial judge to reserve punishment of contempts by participants in a criminal trial. *Hal-linan v. United States*, 182 F. 2d 880 (C. A. 9), certiorari denied, 341 U. S. 952; *MacInnis v. United States*, 191 F. 2d 157 (C. A. 9), certiorari denied, 342 U. S. 953; *Sacher v. United States*, 343 U. S. 1.

clearly did not indicate that the purpose of the sentence was, by coercing petitioner to answer the questions which she had refused to answer at the trial, to aid the Government in its capacity as prosecutor and party to the cause—the characteristic purpose of a civil contempt judgment (*supra*, p. 32). The judge was well aware that, as counsel for petitioner pointed out in the colloquy, the trial was over and the jury disbanded, so that it was then too late for petitioner, even if she were desirous of doing so, to comply literally with the judge's orders by answering the questions at that trial and before that jury. It is clear from the judge's remarks as a whole that he was merely giving expression to the hope that petitioner, by coming forward and answering the questions, notwithstanding that it was too late for such answers to be of any use at the trial, would thereby "[bow] to the authority of the court" (*supra*, p. 16). In other words, he was hopeful that petitioner, by coming forward and answering the questions before him in open court, even at that late date, would indicate a spirit of contriteness and regret for her previous refusals. If she did that, he said, at any time within the 60-day period within which he had the authority to modify the sentence (see Rule 35 of the Federal Rules of Criminal Procedure, *supra*, p. 3), he would "be inclined even at that late date to accept her submission to the authority of the court" (*supra*, p. 16). That is to say, he would in that event, because it would be the "humane, merciful thing to do under the circumstances," as he said (*supra*, p. 16; cf. *United States v. Hallinan*, 103 F. Supp. 800, 801-802 (N. D.

Cal.)), either reduce the sentence or possibly even suspend its execution. But this would be done, as pointed out by the Court of Appeals, solely as a matter "of grace" (R. 44).²²

Petitioner points out, however (Br. 11-12, 57), that Judge Mathes at one time expressed the view, some time after the completion of the principal trial, that petitioner's answers to the questions of June 26th (see *supra*, pp. 7-11), which it was the purpose of the civil contempt judgment to coerce petitioner into supplying, still had "undeterminable potential value" to the Government as prosecutor because of the possibility that a new trial might be ordered in the principal case, which was then pending on appeal (R., No. 13527, pp. 17-18). This view of the judge, however, was rendered in a different proceeding from that here involved, and was given nearly a month following the imposition of the sentence here in issue.²³ There is no indication that this theory (*i. e.*, that the civil contempt judgment still had vitality

²² It is not uncommon for sentences in criminal contempt to provide for a fixed term or until such time as the defendant might purge himself. See, *e. g.*, *Field v. United States*, 193 F. 2d 86, 88; 193 F. 2d 92, 94; 193 F. 2d 109 (C. A. 2), certiorari denied, 342 U. S. 894; *Lopiparo v. United States*, 216 F. 2d 87, 91 (C. A. 8), certiorari denied, 348 U. S. 916.

²³ The opinion to which petitioner refers was rendered September 3, 1952 (R., No. 13527, p. 20), at a later stage of the civil contempt proceeding. It was rendered in connection with the judge's decision that petitioner's confinement under the June 26th judgment should continue despite the termination of the principal trial and the consequent impossibility of petitioner's giving any further testimony therein. It was this aspect of the civil contempt judgment which the Court of Appeals reversed in *Yates v. United States*, 227 F. 2d 844. See fn. 3, *supra*, p. 5.

after the termination of the main trial)—which the court below rejected on appeal (*Yates v. United States*, 227 F. 2d 844)—in any way entered into the judge's thinking as of the earlier time when he imposed sentence in the present case. Indeed, the question at issue in that later proceeding had not arisen as of the time (August 8, 1952) of the imposition of the present sentence (see fn. 8, *supra*, p. 11). There is consequently no warrant for petitioner's attempt to relate this later-expressed view of the judge back to the time of sentence in this case as evidence that the sentence here involved was primarily coercive in its purpose. In any event, there can be no doubt, we believe, for the reasons hereinabove stated (*supra*, pp. 32-35), that the instant sentence was at least primarily punitive in its purpose. No more was required to justify the judge's imposition of a criminal punishment thereunder. *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 443; cf. *McCrone v. United States*, 307 U. S. 61, 64.

III

PETITIONER'S SENTENCE TO ONE YEAR'S IMPRISONMENT
WAS NOT EXCESSIVE IN THE LIGHT OF HER DELIBERATE
AND REPEATED FLOUTING OF THE AUTHORITY OF THE
COURT

Petitioner's remaining contention (Br. 51-58)—that her sentence to one year's imprisonment was of such "shocking severity" as to constitute a "manifest abuse of discretion" amounting to "cruel and inhuman punishment" (Br. 51)—is likewise untenable.

She does not dispute that the character and extent of the punishment imposable for contempt of court, where the contempt is committed in open court and consists of deliberate refusal to obey the judge's orders, are matters lying entirely within the judge's sound discretion. Neither does she dispute the settled principle that an appellate court will not interfere with the exercise of that discretion unless it has clearly been abused. Cf. *Fisher v. Pace*, 336 U. S. 155, 161; *Ex parte Terry*, 128 U. S. 289, 302-304; *MacInnis v. United States*, 191 F. 2d 157, 162 (C. A. 9), certiorari denied, 342 U. S. 953; *In re Maury*, 205 Fed. 626, 632 (C. A. 9). Her sole contention is that there was such an abuse of discretion in this case. We submit, however, that the one-year prison sentence which was imposed for the deliberate and repeated flouting by petitioner of the authority of the court which this record discloses (*supra*, pp. 11-14) was not excessive.

A sentence of up to one year's imprisonment is specifically authorized by statute for a witness' refusal to answer a single question pertinent to the matter under inquiry at a congressional committee hearing (2 U. S. C. 192). Indeed, a *minimum* sentence of one month is made mandatory by that statute, in addition to which a fine of not less than \$100 nor more than \$1,000 is mandatory for each such refusal. Prison sentences of as much as one year in one instance and 18 months in another have been imposed under that statute for refusals to answer committee questions. *United States v. Orman*, 207 F. 2d 148,

152 (C. A. 3); *United States v. Costello*, 198 F. 2d 200, 202 (C. A. 2), certiorari denied, 344 U. S. 874.²⁴ Under § 402 of Title 18, which, like § 401 (involved at bar), deals with contempts of court, and which specifically excepts from its coverage contempts committed in open court, sentences of up to six months' imprisonment or a fine of \$1,000, or both, are imposable for each and every act of disobedience committed. Here, petitioner received a one-year sentence (and no fine) for multiple acts of disobedience.

The court below, in sustaining the sentence, did remark that it "was severe" (R. 47). But the court did not believe that the sentence was disproportionate to the seriousness of petitioner's offense, of which a mere reading of the cold record (cf. *Fisher v. Pace*, *supra*, 336 U. S. at 161; *Hallinan v. United States*, 182 F. 2d 880, 888 (C. A. 9), certiorari denied, 341 U. S. 952),—revealing as that is (*see supra*, pp. 11-14)—can convey no adequate appreciation. Petitioner's attitude throughout her cross-examination was, as remarked by the trial judge, one of "defiance of the authority of the court" (R. 27). That this attitude may have been dictated by what she conceived to be a conscientious duty to refrain from answering

²⁴ Petitioner points out that in "legislative contempts" the accused is entitled to a jury trial, unlike the accused in a summary contempt proceeding such as that involved at bar (Br. 55, fn. 22). The distinction has no present relevance, however. Petitioner's guilt of the offenses of which she stands convicted, and which were committed in open court, has been established according to the procedures prescribed for such contempts.

certain questions relating to her associates, notwithstanding that the relevance of those questions to the issues of the trial cannot be disputed (see fn. 11 *supra*, pp. 20-21), does not lessen the degree of her offense.

Petitioner, a defendant at a criminal trial, elected to take the witness stand in her own defense. She thereby waived the immunity to giving testimony which otherwise was hers. She sought, however, to make her waiver partial—to “pick and choose,” as observed by the court below, the questions to which she would give answer (R. 47). But, as this Court has emphasized, the waiver of immunity by a defendant who takes the witness stand “is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing” (*Raffel v. United States*, 271 U. S. 494, 497). Petitioner willfully, and with full appreciation of the consequences of her action, sought to “determine what testimony to give and what to withhold”, and thus to “transfer from the court to [herself] the management of the trial” (*United States v. Gates*, 176 F. 2d 78, 80 (C. A. 2)) with respect to all matters affecting her own cross-examination. That such usurpation by a party of the function of the court is not the trivial offense which petitioner would make of it, this Court has had occasion to remind:

If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside,

then are the courts impotent, and what the Constitution now fittingly calls the "judicial power of the United States" would be a mere mockery.²⁵

Judge Mathes may well have believed, as indeed the record indicates was probably the case, that petitioner took the stand knowing full well that she would refuse answers to all prosecution questions which she should decide would be inconvenient to answer—that her refusals to answer were part of a course of conduct intended from the beginning to flout the court's authority if she deemed it appropriate.²⁶ Whether such was the case was for the judge to decide, as it was for him to take into account all other surrounding circumstances in fixing punishment. The sentence was not the product of haste or of the heat of altercation. It was imposed after due reflection, some five weeks following the happening of the events in issue, during which time petitioner, despite ample opportunity, had evidenced no willingness whatever to seek to purge herself. It was not excessive by the standards set by statutory and case law. There was no abuse of discretion.

²⁵ *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 450.

²⁶ *Cf.* the observation of the court below in one of the related contempt proceedings: "If the trial judge believed the consistent refusal was part of a concerted action to bring into disrepute the jury trial as an instrumentality of democratic government, then it was his duty to punish and ours to affirm" (*Yates v. United States*, 227 F. 2d 848, 850).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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SEPTEMBER 1956.

OCT 4 1956
JOHN T. FEY, Clerk

IN THE
Supreme Court of the United States

October Term, ~~1955~~ 1957

No. ~~15~~ 2

OLETA O'CONNOR YATES,

Petitioner,

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

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IN THE
Supreme Court of the United States

October Term, 1956.

No. 15.

OLETA O'CONNOR YATES,

Petitioner,

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

I.

**Reply to Respondent's Argument on the Multiplication
of Offenses.**

Respondent argues (Br. pp. 20-31) that this case does not involve "the multiplication of an essentially single offense into several offenses" (Br. p. 20). It presents three theories to support its position: The first, that there were at least six contempts (Br. p. 30, n. 16), treating the refusal to identify petitioner's co-defendants as one contempt and the refusal to identify the specified third persons as separate contempts; the second, that there were at least nine contempts (Br. p. 26), treating each refusal to identify a different named person on June 30 as a separate offense; third, even if a single offense were committed, treat-

ing the refusals to answer on June 26 and the refusals to answer on June 30 as one contempt, the trial judge was within his power in imposing the criminal sanctions of one year imprisonment as he did in this case (Br. pp. 22-23). We treat these arguments separately.

A. Respondent concedes that at the outset of petitioner's cross-examination on June 26, she declined to identify persons as members of the Communist Party because petitioner didn't want to become a "Government informer" (Br. p. 7), that she didn't want a person "to suffer the loss of his job, his income, and perhaps be subjected to further harassment," that "however many times" she were asked to identify a person as a communist, she couldn't bring herself to do it "because I know it means loss of job, persecution for them and their families, . . . even opens them up to possible violence" (Br. p. 9).

At various points in its brief (pp. 25, 27, 29), respondent also concedes, assumedly, that it would have been invalid to punish as a contempt subsequent refusals to answer similiar questions upon the same grounds. "Her refusals, though plural in form," would then be "but one in essence" (Br. p. 27). Respondent argues, however, that because petitioner identified certain persons as members of the Communist Party who could not be injured by her testimony such as the national chairman of the Communist Party, William Z. Foster, a person who was deceased, and co-defendants who had not rested, that therefore for this reason petitioner's continued adherence to her original position with respect to those who would be injured if she informed on them results in the commission of separate contempts each time she refused to identify a named person. Respondent asserts that petitioner should not be permitted to so "pick and choose" (Br. p. 31); that

the proper course apparently would have been to refuse to identify any persons as members of the Communist Party even if they were deceased or as nationally prominent as William Z. Foster, if multiplied offenses were to be avoided. Then petitioner's refusals would have been but "one in essence."

The arbitrary rule which respondent seeks to improvise runs directly counter to the policy of the law. The contempt power is invoked against a recalcitrant witness upon the underlying principle that the cause of justice requires the testimony of all witnesses. The policy of the law is to encourage witnesses to give their testimony in law suits when required to do so. Here a witness has limited her refusal to answer questions solely with respect to persons who may be injured by her identification of them as members of the Communist Party; as to all others she gives the testimony requested by the prosecution. Yet respondent would invoke a rule of law which would discourage the giving of such testimony and encourage additional withholding of testimony.

The inconsistency of respondent's position is exemplified by its acceptance of the *Costello* ruling on this aspect of the case. Respondent states that "it is true . . . that where a witness flatly refuses to testify at all his contempt cannot be multiplied by repeatedly asking him questions" (Br. p. 25). But, argues respondent, if the witness does not totally refuse to answer, if he narrowly draws the area of refusal—no matter how single the attitude—then the contempt is multiplied each time there is a refusal to answer on the same ground. Thus, a *Costello* commits only one punishable act of contempt by refusing to answer all questions; the petitioner commits as many acts of contempt as the prosecutor chooses to ask questions which the

petitioner, upon the same conscientious grounds, declines to answer. Under such theory of law, the exercise of the contempt power becomes a means, not of obtaining the testimony of witnesses, but of punishing those who testify too much.

Fundamentally, respondent refuses to accept the view that the test must be whether the offense was a single course of conduct, whether there was a singleness of thought, purpose or action which constituted but a "single impulse" (Pet. Br. p. 34). Under this test, respondent's argument falls of its own weight. For the petitioner from the outset, with undisputed sincerity and respect on this record, advised the court that she would, and did, answer every question put to her except that she could not inform upon persons, that she could not identify persons as Communists who would be injured by such identification. This was her position at the outset and she adhered to this position. Respondent has not adduced the slightest proof to indicate why petitioner's continued adherence on June 30 to her originally stated position of June 26 was a separately punishable contempt, limited as the area of refusal was in this case.

B. Alternatively, respondent argues (Br. pp. 24-27) that even if petitioner did adhere to her position throughout her cross-examination, still her position stated on June 26 was merely a "blanket advance declaration of an intention not to be cooperative" and that petitioner could not limit the "classes or types of questions" which the prosecutor could ask. Respondent immediately concedes, however, that a witness' refusal to answer a certain question cannot be made the basis of multiple contempts by continuing to ask the same question in different forms, and this respondent concedes is true even when the witness

initially chooses to answer no questions at all. Respondent states that the aforesaid rules apply when the questions seek to establish but a single fact, or relate to but a single subject of inquiry. Here, however, it is argued that the questions sought to prove "a number of facts" and related to "at least as many subjects as the number of persons referred to in the questions, *i. e.*, nine different persons" (Br. p. 26).

If the attitude, conduct, intent or impulse of the witness is plainly shown to be single, the asserted offense cannot be multiplied merely because the prosecutor's questions refer to different persons (Pet Br. pp. 34-38). In *Costello*, the inquiries were not with respect to a single fact or subject matter (Pet. Br. p. 36), yet respondent concedes that offenses could not be multiplied after the witness initially stated he would answer no questions at all. In the case herein, moreover, the subject matter of the inquiries was the same and the grounds for the refusal the same, as respondent's Statement of the Case and the opinion of the court below make plain.

Respondent argues that *Costello* also held that total refusals to answer the questions of the legislative committee on two separate days were punished as separate contempts, and that such ruling justifies punishing petitioner separately for every refusal to answer concerning a different individual (Br. p. 27, n. 13). Aside from other distinctions (Pet. Br. p. 39, n. 21), *Costello's* different excuses for ill health on the separate days were proven to be baseless in fact. His own doctor contradicted him. No such comparable situation is presented here. Petitioner sought in every way to answer every question put to her, told how long she knew the specified persons who were proven undisputedly by respondent to be members of the Communist

Party. The trial judge recognized that she did not want to be an informer, and petitioner made clear from the outset that her unwillingness to act as an informer was solely because her identification might injure persons in their person or their livelihoods. The prosecutor and the trial judge knew this clearly when the punishment of one year imprisonment for the alleged contempts of June 30 was imposed.

C. Respondent argues that if petitioner's "several refusals of both days constituted but one contempt" (Br. p. 22), the trial judge was not precluded from invoking criminal contempt powers with respect to the June 30 refusals even if civil contempt powers were solely invoked with respect to the June 26th refusals (Br. p. 22).

This argument in the first place overlooks the fact that the court below ruled (and respondent sought no review) that since the civil contempt proceedings of June 26 were concluded without any notice to petitioner that she might in the future be subjected to criminal contempt charges, due process was violated (App. F., pp. 33-34). If, as respondent assumes, only a single contempt was committed on both days, then under the ruling of the court below the trial judge exhausted his power to punish in contempt when he concluded the civil contempt proceedings without notice of future criminal sanctions.

In the second place, if the single contempt was punishable civilly and criminally by the trial judge, he did so by first confining the petitioner for the duration of the trial and then sentencing her after the trial to three years imprisonment. Respondent itself states: "From September 8 to September 11, 1952, petitioner was again confined this time pursuant to a criminal contempt judgment [the

three years judgment] based upon the same refusals to answer as those on which the civil contempt order had been based" (Br. p. 11, n. 8). This three year judgment, lacking due process, was later set aside on appeal, but the one year sentence here was imposed intentionally below for a "separate" contempt and this Court cannot now, it is respectfully submitted, retry the proceedings *de novo* and enter new judgments based upon respondent's version of what "could have been done."

In the third place, this phase of respondent's argument is based on the view that the refusals to answer on June 30 were contempts of equal stature with the alleged contempts of June 26 when petitioner initially stated her grounds for declining to answer. Petitioner contends, as *Costello holds*, that the subsequent refusals to answer on June 30 were not contempts, but merely statements of adherence by petitioner to her original position. The contempt, if it was committed at all, occurred only on June 26 and for this petitioner was punished civilly and criminally by the three years sentence. The one year sentence which respondent now seeks to impress on the "single" contempt of both June 26 and June 30 was in fact imposed solely for the conduct of June 30 when no contempt in legal contemplation was committed.

The petitioner was neither "left wholly undisciplined or only partially punished," as respondent contends (Br. p. 31). She was disciplined and severely punished by confinement in prison for seventy days (Pet. Br. pp. 10-19). The contention here is only that it was unlawful to treat her continued refusal to answer upon the same grounds as additional offenses punishable by one year imprisonment. Respondent has essentially abandoned the reasoning of the courts below, and attempted to create different

theories, however contradictory, to support the judgment herein. The essential fallacy of these views is bottomed upon respondent's disregard of the record, the historical and legal precedents which govern the exercise of the drastic power of contempt, and the conscientious position of petitioner. The unfettered contempt power for which respondent contends, in operation and effect, will give prosecutors in Smith Act trials a weapon which will either make it impossible for an accused to take the stand, or substantially undermine his defense if he does.

II.

Reply to Respondent's Argument on the Dominant Purpose of the Contempt Proceedings.

The respondent contends that the principal purpose of the punishment of petitioner was "vindication of the authority of the court, and so was properly made criminal in character" (Br. p. 32). Having said this much, respondent's "Statement of the Case" and "argument" proves quite the contrary.

Respondent states that "it is true" that at the time of sentencing the trial judge expressed the hope that petitioner would "purge" herself of the contempt (Br. p. 33), but argues that this did not indicate that the purpose of the sentence was to coerce the petitioner to answer for the benefit of the prosecutor—"the characteristic purpose of a civil contempt judgment" (Br. p. 34). But respondent omits from the Statement of the Case and its argument, the following statement of the Court at the time of imposing the one year sentence: "Now, the Government was entitled on cross-examination to show, if they could, that that person whom Mrs. Yates impliedly said was a very foolish person was a friend of Mrs. Yates of long standing

who had worked with her, whatever the proof would show [See Pet. Br. p. 16, n. 10]. We do not know" (R. 32). This statement makes plain not only the trial court's self identification with the prosecutor, but the court's purpose to obtain the answers.

The respondent states that the court agreed with counsel that it was too late for petitioner "to comply literally with the judge's orders by answering the questions at that trial and before that jury" (Br. p. 34). But that does not indicate that the principal purpose of the court was not to coerce the answers of the petitioner. The court subsequently made clear what its understanding was. The view of the trial court was that there is a difference between "termination of the trial" and "termination of the litigation" (App. C, p. 13). The trial had been literally terminated, the court agreed, but the litigation had not been completed (since appeals were pending) and therefore, "the answers now sought to be coerced from defendant Yates *qua* witness have undeterminable potential value to the plaintiff in the criminal case now pending on appeal" (App. C, p. 15). This was the undeviating view of the trial judge throughout all the contempt proceedings (Pet. Br. pp. 5-20).

Respondent is therefore in error as to the dominant purpose of the contempt proceedings, and no less so because it urges that the court desired only to have petitioner "purge" herself by answering in order to show "a spirit of contriteness and regret for her previous refusals" (Br. p. 34). This only establishes that the court was intent on obtaining the answers, albeit for alleged "humane" reasons. To treat the answers as a "purge" of contempt means only that the petitioner in the court's opinion had "the keys to the jail in her own pocket," and this was precisely

what the court told the petitioner was the situation with respect to both the one and three years sentence of imprisonment (Pet. Br. p. 18).*

Respondent argues that the court's statements should be treated as merely "humane, merciful" remarks, solely as matters of "grace" (Br. pp. 34-35). But insistence after the trial that petitioner answer the questions and renounce her conscientious scruples was neither "humane" nor "merciful." If the principal purpose of the contempt proceedings was punishment to vindicate the court's authority, the basic consideration on the question of mitigation of sentence was the length of the confinement which petitioner had already endured. The authority of the court could not be "vindicated" by answering questions after trial when petitioner had declined to answer the questions during the trial. In insisting that the questions be answered before any consideration of mitigation of the sentence, the trial judge clearly indicated that the dominant purpose of the contempt proceedings was coercion, not punishment.

Not only does respondent disregard what the court said at the time of sentence, but it asks this Court to disregard all statements made by the trial judge in these closely related contempt proceedings (Br. p. 35). But as the court below made clear, all of the subsequent statements of the

*" . . . if the violation is proved the wrongdoer is committed to prison to remain until he purges himself of his contempt by doing the right or undoing the wrong." Beale, *Contempt of Court, Criminal and Civil*, 21 Harv. L. Rev. 161, 169. See also, *Doyle v. London Guarantee & Acci. Co.*, 204 U. S. 599, 605-8. Here the trial judge assumed that he had the power to compel petitioner to do "the right" by answering the questions, and thus purging her of the contempt entirely. His purpose was thus plainly shown to be coercive.

trial judge illumined his real intent and purpose from the beginning. "Since proceedings in contempt are *sui generis*, here the whole course of action in the criminal trial and all subsequent proceedings must be appraised" (App. F, p. 34, n. 5).

III.

Reply to Respondent's Argument on the Excessiveness of the Sentence of Imprisonment.

Respondent maintains that the sentence of one year imprisonment imposed upon petitioner was not excessive. It makes no attempt to discuss the history and purpose of the Contempt Act, nor does it discuss the legal precedents which indicate how grossly excessive the sentence was here (Pet. Br. pp. 51-58).

Nor does respondent dispute the fact that under the legal precedents there was in actuality no obstruction of justice here, the essential characteristic upon which the contempt power rests (Pet. Br. pp. 40-44). Respondent argues that the issue as to whether there was a contempt committed at all by the petitioner was never raised at any prior stage of the trial, nor in the petition for writ of certiorari, and is therefore not properly before this Court (Br. p. 20, n. 11). But on the issue of *the excessiveness of the sentence*, the question was always raised (R. 33-34; Pet. Br. in Court of Appeals, p. 51), and is a subsidiary question fairly comprised within Question 3 in the petition for a writ of certiorari (p. 3). Respondent labors to show that the questions had some relevance (See Pet. Br. pp. 43-44), but it makes no attempt to prove that the refusals to answers in any way impeded the administration of justice.

Respondent points to the permissible maximum sentence of one year in legislative contempts (Br. p. 37). It over-

looks that an accused in such proceeding is entitled to every element of due process, while in a summary contempt proceeding the accused is entitled to none (Pet. Br. p. 55, n. 22). As to the relevance of 18 U. S. C. 402 and the decision in *Ryals v. United States*, 69 F. 2d 946 (C. A. 5, 1934) (Pet. Br. p. 55), respondent can only argue that the maximum sentence of six months for indirect contempts can be applied to a single offense while here there were "multiple acts of disobedience" (Br. p. 38), a clear indication of the use to which prosecutors can put their theory of multiplying contempts.

The sum of respondent's argument is that the sentence of one year imprisonment was not excessive because petitioner, under a claim of conscience, took over the "management" of the trial and sought "to pick and choose" the questions to which she would give answer (Br. pp. 38-40). This is a contrived argument based on a distortion of the record, it is respectfully submitted. Petitioner was subjected to a lengthy cross-examination (Tr. 11,228-740, 11,853-72). Her answers were full and direct. She made no attempt to evade any question, and even with respect to the named individuals, answered how long she knew them. Her confirmation of respondent's proof as to the membership of these persons in the Communist Party before the jury was virtually complete, despite her conscientious scruples at identifying them. Everything in the record indicates petitioner's desire to make all her testimony available to the prosecutor except the extremely narrow matter of her own identification of persons as members of the Party. The prosecutor was never prevented from asking petitioner questions concerning her denial of participation in the alleged "conspiracy." But instead of asking such questions, the prosecutor sought only names (Pet. Br. pp. 13-14).

Conclusion.

Respondent's own arguments establish the invalidity of the judgment and sentence of contempt imposed upon petitioner. The judgment of the court below should be reversed.

Respectfully submitted,

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Attorney for Petitioner.

LEO BRANTON, JR.,

Of Counsel.

SUPREME COURT OF THE UNITED STATES

No. 2.—OCTOBER TERM, 1957.

Oleta O'Connor Yates, Petitioner, v. United States of America.	} On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
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[November 25, 1957.]

MR. JUSTICE CLARK delivered the opinion of the Court.

This case is one of criminal contempt for refusal to answer questions at trial. Petitioner, admittedly a high executive officer of the Communist Party of California, and 13 co-defendants were indicted and convicted of conspiracy to violate the Smith Act.¹ During the trial, petitioner refused on June 30, 1952, to answer 11 questions relating to whether persons other than herself were members of the Communist Party. The District Court held petitioner in contempt of court for each refusal to answer, and imposed 11 concurrent sentences of one year each, which were to commence upon the defendant's release from custody following execution of the five-year sentence imposed in the conspiracy case. This judgment was affirmed by the Court of Appeals. 227 F. 2d 851. We granted certiorari. 350 U. S. 947. The principal question presented is whether the finding of a separate contempt for each refusal constitutes an improper multiplication of contempts. We hold that it does, and find that only one contempt has been committed.

The circumstances of petitioner's conviction are these. After the Government had rested its case in the Smith Act trial, all but four of the defendants—petitioner and three others—rested their cases. Petitioner took the

¹ This Court reversed the convictions in the principal case. *Yates v. United States*, 354 U. S. 298 (1957).

stand and testified in her own defense. During the afternoon of the first day of her cross-examination, June 26, 1952, she refused to answer four questions about the Communist membership of a non-defendant and of a co-defendant who had rested his case.² In refusing to answer, she stated, ". . . [T]hat is a question which, if I were to answer, could only lead to a situation in which a person could be caused to suffer the loss of his job . . . and perhaps be subjected to further harassment, and . . . I cannot bring myself to contribute to that." She added, "However many times I am asked and in however many forms, to identify a person as a communist, I can't bring myself to do it" The District Court adjudged her guilty of civil contempt for refusing to answer these questions, and committed her to jail until she should purge herself by answering the questions or until further order of the court. She was confined for the remainder of the trial.³

² At the morning session petitioner indicated that she would answer questions as to the Party membership of co-defendants who had not rested their cases, and in fact she did so.

³ The trial ended on Aug. 5, 1952. Petitioner was confined under the judgment of conviction in the principal case until Aug. 30, 1952, when she was released on bail pending appeal in that case. She was reconfined on Sept. 4, 1952, this time under the civil contempt order of June 26. She was released on bail on Sept. 6, 1952, pending appeal from the order directing her reconfinement. That order was reversed on appeal on the ground that petitioner could not purge herself of the civil contempt since the trial had ended. *Yates v. United States*, 227 F. 2d 844. Petitioner was again confined on Sept. 8, 1952, after the District Court, on that same day, adjudged her in criminal contempt of court for her June 26 refusals to answer. She was released on bail on Sept. 11, 1952, pending appeal from that judgment, which was later reversed on appeal because the district judge had given her no notice at the time of the trial that he expected to hold her in criminal contempt for the June 26 refusals. *Yates v. United States*, 227 F. 2d 848. Neither the civil nor the criminal contempt sentences for the June 26 refusals, nor their reversals, are under review in the present case.

On the third day of petitioner's cross-examination, June 30, 1952, despite instructions from the court to answer, petitioner refused to answer 11 questions which in one way or another called for her to identify nine other persons as Communists. The stated ground for refusal in these instances was petitioner's belief that either the person named or his family could "be hurt by" such testimony. She expressed a willingness to identify others as Communists—and in one instance did so—if such identification would not hurt them. The judge stated that he expected to treat these 11 refusals as criminal contempt under Rule 42 (a) of the Federal Rules of Criminal Procedure.⁴ Adjudication of the contempt was deferred until completion of the principal case.

After conviction and imposition of sentences in the conspiracy case, the court, acting under 18 U. S. C. § 401,⁵ found petitioner guilty of "eleven separate criminal contempts" for her 11 refusals to answer questions on June 30. No question is raised as to the form or content of the specifications.

The court sentenced petitioner to imprisonment for one year on each of the 11 separate specifications of criminal contempt. The sentences were to run concurrently and were to commence upon her release from custody follow-

⁴ "A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record."

⁵ "SEC. 401. *Power of Court.* A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

"(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

"(2) Misbehavior of any of its officers in their official transactions;

"(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

ing execution of the five-year sentence imposed on the conspiracy charge. Upon imposing sentence, the court stated that if petitioner answered the 11 questions then or within 60 days, while he had authority to modify the sentence under Rule 35 of the Federal Rules of Criminal Procedure, he would be inclined to accept her submission to the authority of the court. However, petitioner persisted in her refusal.

The summary contempt power in the federal courts, "... although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions. Without it, judicial tribunals would be at the mercy of the disorderly and violent, who respect neither the laws enacted for the vindication of public and private rights, nor the officers charged with the duty of administering them." *Ex parte Terry*, 128 U. S. 289, 313 (1888). The Judiciary Act of 1789 contained a section making it explicit that federal courts could "punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same" 1 Stat. 73, 83. After United States District Judge Peck's acquittal in 1831^{*} on charges of high misdemeanors for summarily punishing a member of the bar for contempt in publishing a critical comment on one of his judgments, Congress modified the statute. In the Act of 1831, the contempt power was limited to specific situations such as disobedience to lawful orders. 4 Stat. 487. See Frankfurter and Landis, Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts, 37 Harv. L. Rev. 1010, 1023-1038. The present code provision is substantially similar.⁷ We have no doubt that the refusals in question constituted contempt within the meaning of 18 U. S. C. § 401 (3).

^{*} Stansbury, Report of the Trial of James H. Peck (1833).

⁷ See note 5, *supra*.

This case presents three issues. Petitioner claims that the sentences were imposed to coerce her into answering the questions instead of to punish her, making the contempts civil rather than criminal and the sentences to a prison term after the close of the trial a violation of Fifth Amendment due process. Second, petitioner argues that her several refusals to answer on both June 26 and June 30 constituted but a single contempt which was total and complete on June 26, so that imposition of contempt sentences for the June 30 refusals was in violation of due process. Finally, petitioner contends that her one-year sentences were so severe as to violate due process and constitute cruel and unusual punishment under the Eighth Amendment.

I.

While imprisonment cannot be used to coerce evidence after a trial has terminated, *Yates v. United States*, 227 F. 2d 844; cf. *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 443, 449 (1911), it is unquestioned that imprisonment for a definite term may be imposed to punish the contemnor in vindication of the authority of the court. We do not believe that the sentences under review in this case were imposed for the purpose of coercing answers to the 11 questions. Rather, the record clearly shows that the order was made to "vindicate the authority of the court" by punishing petitioner's "defiance" thereof. The sentencing judge did express the hope that petitioner would still "purge herself to the extent that she bows to the authority of the court" by answering the questions either at the time of the sentencing or within 60 days thereafter. In doing so, however, he acted pursuant to the power of the court under Rule 35 of the Federal Rules of Criminal Procedure *

*"Rule 35. *Correction or Reduction of Sentence.* . . . The court may reduce a sentence within 60 days after the sentence is imposed"

rather than under any theory of civil contempt. Indeed, in express negation of the latter idea, he stated that should she answer the questions, "[i]t could have no effect upon this proceeding and need not be accepted as a purge, because of the fact that the time has passed . . . for the administration of justice in this case to be affected by it."

II.

Petitioner contends that the refusals of June 26 and June 30 constituted no more than a single contempt because the questions asked all related to identification of others as Communists, after she made it clear on June 26 that she would not be an informer. She urges that the single contempt was completed on June 26 since the area of refusal was "carved out" on that day. From this, petitioner concludes that no contempt was committed on June 30 and that imposition of criminal contempt sentences for refusals of that day to answer violates due process guaranties.

A witness, of course, cannot "pick and choose" the questions to which an answer will be given. The management of the trial rests with the judge and no party can be permitted to usurp that function. See *United States v. Gates*, 176 F. 2d 78, 80. However, it is equally clear that the prosecution cannot multiply contempts by repeated questioning on the same subject of inquiry within which a recalcitrant witness already has refused answers. See *United States v. Orman*, 207 F. 2d 148.

Even though we assume the Government correct in its contention that the 11 questions in this case covered more than a single subject of inquiry, it appears that every question fell within the area of refusal established by petitioner on the first day of her cross-examination. The Government admits, pursuant to the holding of *United States v. Costello*, 198 F. 2d 200, that only one contempt would result if Mrs. Yates had flatly refused on June 26

to answer *any* questions and had maintained such a position. We deem it *a fortiori* true that where a witness draws the lines of refusal in less sweeping fashion by declining to answer questions within a generally defined area of interrogation, the prosecutor cannot multiply contempts by further questions within that area. The policy of the law must be to encourage testimony; a witness willing to testify freely as to all areas of investigation but one, should not be subject to more numerous charges of contempt than a witness unwilling to give any testimony at all.

Having once carved out an area of refusal, petitioner remained within its boundaries in all her subsequent refusals. The slight modification on June 30 of the area of refusal did not carry beyond the boundaries already established. Whereas on June 26 the witness refused to identify other persons as Communists, on June 30 she refused to do so only if those persons would be hurt by her identification. Although the latter basis is not identical to the former, the area of refusal set out by it necessarily fell within the limits drawn on June 26. We agree with petitioner that only one contempt is shown on the facts of this case.

That conclusion, however, does not establish petitioner's contention that no contempt whatsoever was committed by her refusal to answer the 11 questions of June 30. The contempt of this case, although single, was of a continuing nature: each refusal on June 30 continued the witness' defiance of proper authority. Certainly a party who persisted in refusing to perform specific acts required by a mandatory injunction would be in continuing contempt of court. We see no meaningful distinction between that situation and petitioner's persistent refusal to answer questions within a defined area.

Though there was but one contempt, imposition of the civil sentence for the refusals of June 26 is no barrier to

criminal punishment for the refusals of June 30. The civil and criminal sentences served distinct purposes, the one coercive, the other punitive and deterrent; that the same act may give rise to these distinct sanctions presents no double jeopardy problem. *Rex Trailer Co. v. United States*, 350 U. S. 148, 150 (1956); *United States v. United Mine Workers*, 330 U. S. 258, 299 (1947).^{*} Clearly, if the civil and criminal sentences could have been imposed simultaneously by the court on June 26, as the *United Mine Workers* case holds, it scarcely can be argued that the court's failure to invoke the criminal sanction until June 30 was fatal to its criminal contempt powers. Indeed, the more salutary procedure would appear to be that a court should first apply coercive remedies in an effort to persuade a party to obey its orders, and only make use of the more drastic criminal sanctions when the disobedience continues. Had the court imposed a civil sentence and found petitioner guilty of criminal contempt on June 26, it could have postponed imposition of a criminal sentence until termination of the principal case. The distinction between that procedure and the one followed here is entirely formal.

III.

While the sentences imposed were concurrent, it may be that the court's judgment as to the proper penalty was affected by the view that petitioner had committed 11 separate contempts. In addition, petitioner has now served a total of over 70 days in jail awaiting final disposition of the several proceedings against her. The con-

^{*} Nor does the finding of a single contempt mean that the criminal contempt sentence under review in this case constitutes double jeopardy because the court also imposed a criminal contempt sentence for the June 26 refusals. The latter was reversed on appeal, note 3, *supra*, and in any event was imposed after the criminal contempt sentence for the June 30 refusals.

spiracy conviction as well as another criminal contempt conviction have been reversed, and the sentences imposed here have been termed "severe" by the Court of Appeals. 227 F. 2d 851, 855. Moreover, the court should consider "... the extent of the willful and deliberate defiance of the court's order [and] the seriousness of the consequences of the contumacious behaviour" *United States v. United Mine Workers, supra*, at 303. In this regard, petitioner's understandable reluctance to be an informer, although legally insufficient to explain her refusals to answer, is a factor, as is her apparently courteous demeanor and the fact that her refusals seem to have had no perceptible effect on the outcome of the trial. All of this points up the necessity, we think, of the trial judge reconsidering the sentence in the cool reflection of subsequent events.¹⁰

The contempt convictions on specifications II-XI, inclusive, are reversed. The contempt conviction on specification I is affirmed, but the sentence on that conviction is vacated, and the case is remanded to the District Court for resentencing in the light of this opinion.¹¹

It is so ordered.

MR. JUSTICE BURTON agrees with the Court of Appeals and the trial court that petitioner's refusals to answer when ordered to do so by the trial court on June 30 constituted at least nine contempts of court. However, in view of all the circumstances, he now joins in the judgment of this Court remanding the case for resentencing.

¹⁰ In addition, the sentences imposed were ordered to commence upon completion of the five-year sentence in the conspiracy case. Reversal of the conspiracy conviction has rendered uncertain the date at which the sentences here imposed would begin.

¹¹ Cf. *Nilva v. United States*, 352 U. S. 385, 396 (1957).

SUPREME COURT OF THE UNITED STATES

No. 2.—OCTOBER TERM, 1957.

Oleta O'Connor Yates, Petitioner,	} On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
v.	
United States of America.	

[November 25, 1957.]

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACK concur, dissenting.

This case to me is a shocking instance of the abuse of judicial authority. It is without precedent in the books.

Mrs. Yates, not wanting to be an informer, refused on cross-examination to answer four questions concerning the Communist Party affiliations of any co-defendant who had rested his case or any other person who might be subject to persecution by such a disclosure.

For this, her *first* refusal, she was given her *first* sentence and confined in jail for 70 days.¹ On the third day of her cross-examination she was asked 11 more questions along the same line and, adhering to her original position, remained adamant in her refusal to answer. The district judge told Mrs. Yates that he intended to treat her refusals to answer as 11 separate criminal contempt, but indicated that he would defer action on the criminal contempt for the *second* refusal for the duration of the trial. The conviction for criminal contempt because of her *second* refusal to testify was affirmed by

¹ The trial judge was not through with Mrs. Yates. In his view, the *first* or "coercive" civil contempt order remained in effect so long as the judgment of conviction in the main case was pending on appeal. The Court of Appeals ordered her released (*Yates v. United States*, 227 F. 2d 844) on the ground that confinement for civil contempt is not permissible after the termination of the trial.

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the Court of Appeals (227 F. 2d 851) and is now affirmed by this Court.²

First. One reason I would reverse is that this is a transparent attempt to multiply offenses. The one offense which Mrs. Yates committed was her *first* refusal to answer. Her *second* refusal was merely the maintenance of the same position she took at the start of her cross-examination. I do not think a prosecutor should be allowed to multiply the contempts by repeating the questions. The correct rule, I believe, is stated in *United States v. Costello*, 198 F. 2d 200, 204.

"Certainly the refusal to testify was an act in contempt of the Committee for which the defendant was subject to the punishment prescribed by the statute. But when the defendant made his position clear, the Committee could not multiply the contempt, and the punishment, by continuing to ask him questions each time eliciting the same answer: his refusal to give *any* testimony. In other words, the contempt was total when he stated that he would not testify, and the refusals thereafter to answer specific questions can not be considered as anything more than expressions of his intention to adhere to his earlier statement and as such were not separately punishable."

Or, as stated in *United States v. Orman*, 207 F. 2d 148, 160.

". . . where the separate questions seek to establish but a single fact, or relate to but a single subject of inquiry, only one penalty for contempt may be imposed."

² Petitioner has not urged that this charge of criminal contempt should have been tried before some other judge. Cf. *Offutt v. United States*, 348 U. S. 11. Nor has petitioner contended that she could be held only on indictment by a grand jury, or tried only by a jury, or prosecuted without the other procedural safeguards of the Fifth and Sixth Amendments.

Any other rule gives the prosecutor and judge the awful power to create crimes as they choose. Because of the prosecutor's efforts to multiply the offense by continuing the line of questions, Mrs. Yates' *second* refusal to answer, following consistently the position she had made clear to the court upon the first day of her cross-examination, was not a contempt. Her *second* refusal to answer was merely a failure to purge³ herself of the first contempt, not a new one.

Second. Mrs. Yates might have been subjected to criminal penalties as well as civil coercion for the contempt she committed upon her *first* refusal to testify. See *Penfield Co. v. S. E. C.*, 330 U. S. 585; *United States v. United Mine Workers*, 330 U. S. 258. The district judge in fact attempted to impose a three-year criminal sentence for her *first* refusal to answer; but he was reversed by the Court of Appeals for his failure to give her the necessary

³ This is apparent from what transpired when Mrs. Yates appeared before the trial judge in this case:

"I had hoped by this time that Mrs. Yates might be willing to purge herself; that she might be prompted to do so.

". . . as I view it, the court, in its discretion, might treat answers now to the questions as a vindication of judicial authority and treat it as purged.

"I take it from the defendant's statement that she is as adamant now as she was the day the questions were put.

"I hope Mrs. Yates will yet purge herself. I think, in offering to accept her answers now as a purge is a humane, merciful thing to do under the circumstances.

"I am not interested in imprisoning Mrs. Yates. I am interested in vindicating the authority of this court, which I feel must be vindicated when anyone wilfully refuses to obey a lawful order of the court.

"If she at any time within 60 days, while I have the authority to modify this sentence under the Rules, wishes to purge herself, I will be inclined even at that late date to accept her submission to the authority of the court."

notice during the pendency of the trial. *Yates v. United States*, 227 F. 2d 848.

What the Court now does is to make the present conviction do service for the invalid conviction for her *first* refusal to testify. This cannot be done unless we are to make a rule to fit this case only.